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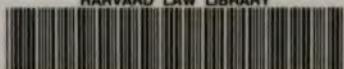
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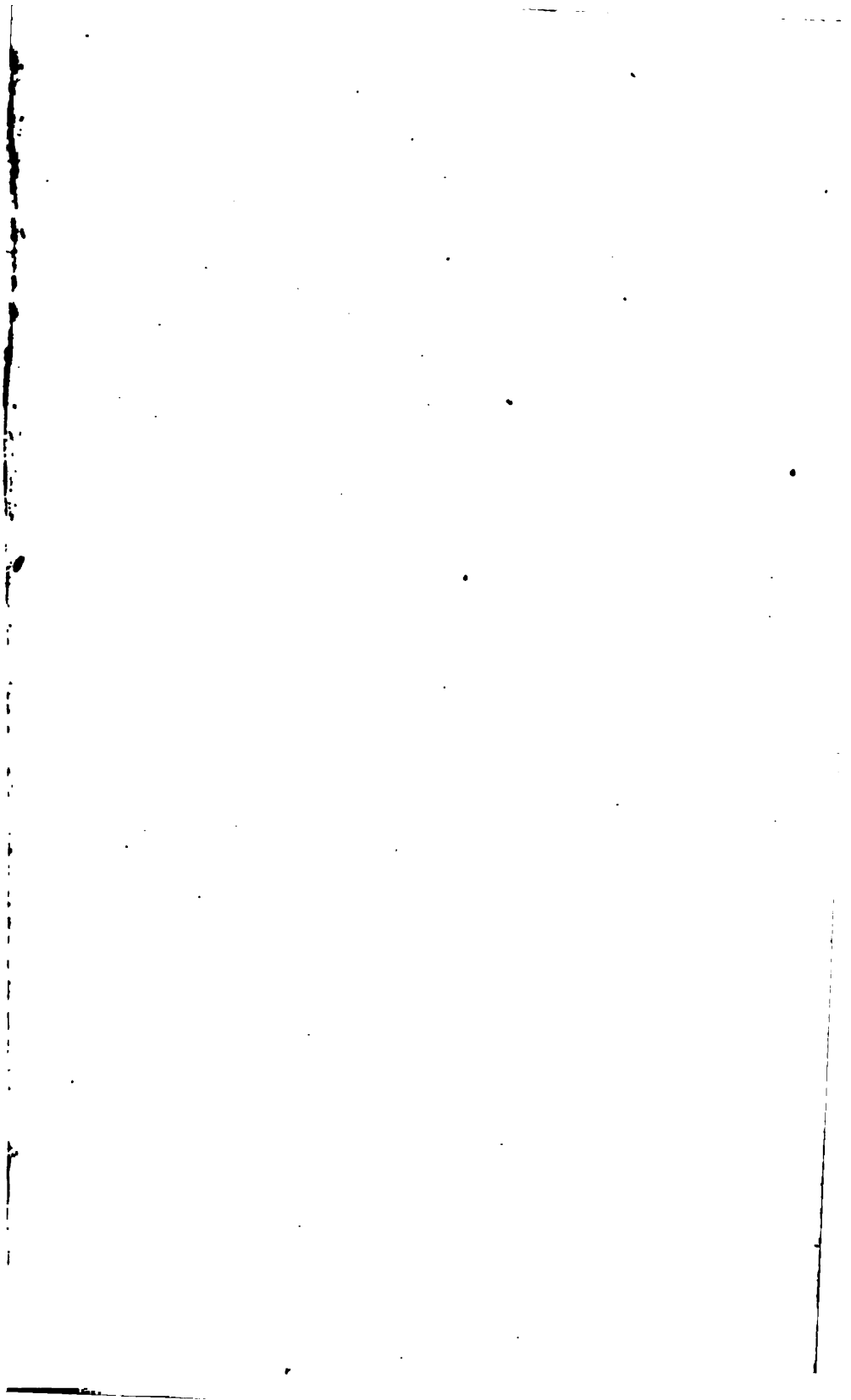
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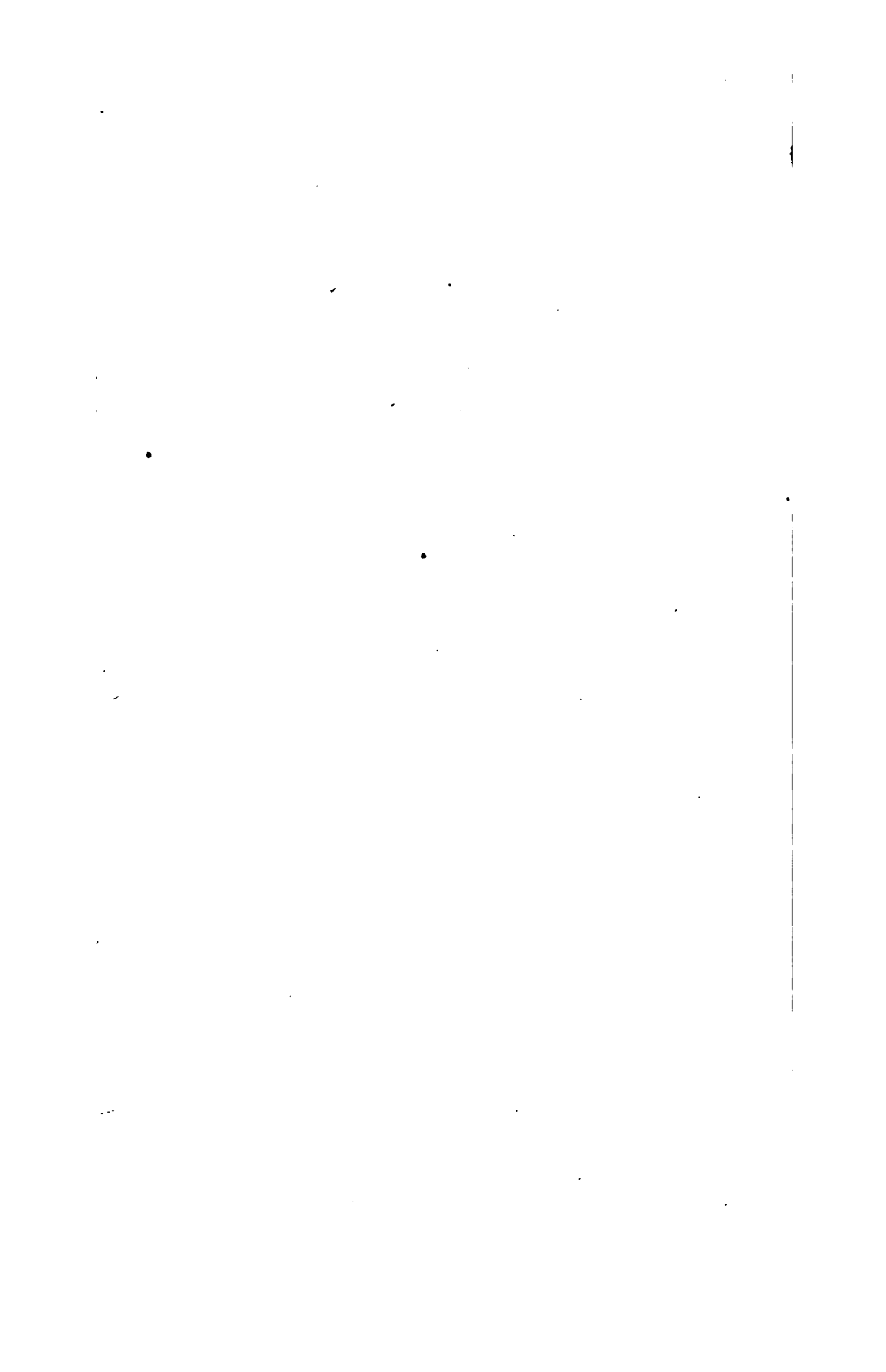


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OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

BY FRANCIS M. DICE,
OFFICIAL REPORTER.

VOL. 78,
CONTAINING CASES DECIDED AT THE NOVEMBER TERM,
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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. BYRON K. ELLIOTT.*†
HON. JAMES L. WORDEN.‡
HON. WILLIAM A. WOODS.†
HON. WILLIAM E. NIBLACK.‡
HON. GEORGE V. HOWK.‡

*Chief Justice at the November Term, 1881.

†Term of office commenced January 3d, 1881.

‡Term of office commenced January 1st, 1877.

SUPREME COURT COMMISSIONERS

OF THE

STATE OF INDIANA.

HON. GEORGE A. BICKNELL.*†

HON. JOHN MORRIS.†

HON. WILLIAM M. FRANKLIN.†

HON. HORATIO C. NEWCOMB.†

HON. JAMES I. BEST.†

* Chief Commissioner.

† Appointed April 27th, 1881.

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OFFICERS
OF THE
SUPREME COURT

CLERK,
JONATHAN W. GORDON.

SHERIFF,
JAMES ELDER.

LIBRARIAN,
FREDERICK HEINER.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1881, IN THE SIXTY-SIXTH YEAR OF THE STATE.

No. 8416.

CITY OF AURORA ET AL. v. FOX ET AL.

PLEADING.—Demurrer.—A demurrer to an entire complaint, containing one good paragraph, should be overruled.

SAME.—Harmless Error.—Practice.—There is no available error in sustaining a demurrer to a good paragraph of an answer, if there remain another paragraph stating substantially the same matter.

CITY.—Damages.—Evidence.—Jury.—In a suit against a city to recover damages for unlawful excavations made adjoining the plaintiff's lot, evidence showing what would be the cost of a wall along the line of the plaintiff's lot, to protect it from caving, is admissible, the necessity of such a wall being a question for the jury.

SAME.—City Council.—Declarations.—Parol evidence of the proceedings of a city council, and of the declarations of individual members thereof, in ordering the grading of a street, is not admissible, until some valid excuse is shown for not producing the record of such proceedings.

SAME.—Improvement of Streets.—Statute Construed.—Sections 3162 to 3165, R. S. 1881, apply only where a city seeks to improve its streets at the expense of the abutting owners, and do not limit the general powers over streets conferred by other provisions of law; and where a city, in the exercise of its general powers and at the expense of its treasury, grades a street, it is not liable to adjoining owners for consequential injuries, merely because it fails to comply with the requirements of those sections.

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SAME.—Grading Streets.—Earth can not be removed from a street except for its improvement, nor can such earth be used by a city except to grade that or other streets, the grading of which is part of the same general plan of improvement.

SAME.—Adoption of Plan.—Where the common council directs that a plan of improvement for S. street be prepared, which is accordingly done and reported, and the action of the council thereon appears on its record in these words: "The survey and plan for the improvement of S. street by J. is accepted," an adoption of the plan is sufficiently shown.

SAME.—Case Criticised.—While the question actually before the court in *City of Delphi v. Evans*, 36 Ind. 90, was correctly decided, there are many expressions in the opinion in that case which can not be maintained.

From the Dearborn Circuit Court.

C. S. Jelley, W. S. Holman and W. S. Holman, Jr., for appellants.

D. H. Stapp, H. D. McMullen and D. T. Downey, for appellees.

ELLIOTT, C. J.—Appellees' complaint is in two paragraphs. One at least is good, and, as the demurrer was addressed to the entire complaint, it was properly overruled, even though one of the paragraphs is bad.

The complaint alleges, in substance, that the City of Aurora, without having adopted any general plan for the improvement of the streets, and without having advertised for proposals, and also without having entered into a written contract, proceeded to dig into and cut down a street upon which appellees' house and lot were situated, and without right hauled away and appropriated the soil of said street. It is further alleged that by reason of the cutting down of said street the appellees' property was greatly injured. The complaint states a case within the rule declared in *City of Delphi v. Evans*, 36 Ind. 90; for it shows a wrongful carrying away of the soil of the street.

A demurrer was sustained to the second paragraph of the appellants' answer, but no available error was committed, even if it be conceded that the pleading was sufficient, for the

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reason that the same defence was substantially stated in another paragraph, which was held good.

The error alleged upon the ruling denying a new trial presents all the other questions in the case. Testimony was admitted over the objection of the appellant as to the cost of erecting a wall along the line of appellees' lot. This ruling was not erroneous. If the appellants' wrongful act made it necessary for the protection of appellees' property to erect the wall, its cost was a proper element for the jury to consider in estimating damages. It is, however, contended by the appellants' counsel that no wall was necessary. Whether there was or was not a necessity for the wall was a question of fact for the jury.

Michael Teany, one of the appellees' witnesses, was permitted to testify as to the proceedings of the common council of the city of Aurora, and as to the declarations of individual members of that body. An objection was interposed and overruled. The ground of objection was that the proceedings of the common council could not be proved by parol. No effort was made to secure the production of any of the corporate records, nor was it shown that no record had been made. The custodian of the records was not called; neither was there any notice to produce the corporate records. It is clear to our minds that the court erred in admitting this testimony. The record of the proceedings of the common council was the primary evidence. Until some valid excuse was shown for not producing the primary evidence, secondary was not admissible. There are cases where corporate proceedings may be shown by oral testimony, but this is not one of them.

The third instruction given by the court contains the following statement: "To the city, however, belongs the right, under the corporate powers conferred upon it by the charter, to grade and improve Square street, and use the same for the purpose of a highway. But before the city can make such improvements certain provisions of the city charter must be complied with. First, an order, resolution or ordinance must

City of Aurora *et al.* v. Fox *et al.*

be passed by the common council authorizing the improvement. If the city, of her own volition, directs that the improvement of the street be made, the order, resolution or ordinance must be adopted by a two-thirds vote of the common council, and then such vote and the ordinance must be entered of record. If this is not done, the city can not shield itself from liability under such order, resolution or ordinance. The improvements must also be based upon plans and specifications fixing the grade and the improvement to be made, which grade and specifications must be adopted by said common council, and they must correspond with the general plan for the improvement of the streets of the city." The fourth instruction contains the following: "In addition to these prerequisites, the city, before she can lawfully commence the contemplated improvement, must advertise for proposals to do the work, and, when so advertised, the contract for the work must be in writing, signed and delivered by the party to whom the work is let, who must also give bond for the faithful performance of the contract."

The court, by these instructions, required of the appellant as strict an adherence to the provisions of the charter as would have been necessary had the case been one against a property owner for the collection of an assessment. The theory of the trial court was, that the city is liable as a trespasser, if every statutory provision is not complied with. The case is, it must be kept in mind, a very different one from that of a proceeding to enforce the collection of an assessment for a street improvement. The municipal corporation, in making an improvement of a street over which it possesses "plenary power," as was said in *Wood v. Mears*, 12 Ind. 515, is doing a very different thing from enforcing a summary remedy for the collection of the cost of an improvement from adjacent property owners. The appellees rested their case in the trial court, and rest it here, upon the case of *The City of Delphi v. Evans*, 36 Ind. 90. There are expressions in the opinion in that case which do sustain the appellees' theory, that a

municipal corporation is to be deemed a wrong-doer if it digs into a public street for the purpose of grading or paving, unless the corporate authorities have complied with the provisions of the charter providing for the assessment of the expense of improving the street upon the abutting property. These expressions were not necessary to the decision of the point in judgment. It was not necessary to decide in that case, whether the corporation was liable as a trespasser if it undertook to improve the street without strictly following the provisions of the charter to which we have referred. What was decided, and all that was decided, in that case, is shown in the conclusion of the opinion, which reads thus: "It appearing from the allegations of the complaint that the common council of the city of Delphi had made no order establishing the grades and ordering the improvement of Washington, Wilson, and Frank streets; that the excavation was not made in Frank street for the improvement of such street; and that the work was not done in a careful and skilful manner, but that the same injured the street and damaged the property of the plaintiff, we are of the opinion that the court committed no error in overruling the demurrer to the complaint; and, this being the only error assigned, it results that the judgment must be affirmed."

It is clear that the case from which we have quoted does not decide that a municipal corporation is a trespasser, if it excavates a street for the purpose of grading, unless it has proceeded strictly in accordance with the provisions of the charter empowering it to collect the cost of the improvement from the adjacent lot owners. What is said in the opinion lending support to such a doctrine as that for which appellees contend, can not be supported upon principle or authority.

The right to the soil of the street remains in the owner of the fee, and the municipal corporation has no right to remove it, unless its removal be necessary for the improvement of the street. The removal of the soil for any other purpose than that of improving the street is an actionable wrong.

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Where there is a general plan for the gradation and improvement of highways, intersecting streets and highways in the vicinity of the one improved are to be deemed parts of the same general plan, and soil may be removed from one and placed upon another. 2 Dill. Munic. Corp., sec. 687. It is therefore necessary, as held in *City of Delphi v. Evans, supra*, that, where the soil is removed from one street to another, it should be shown that the improvement of the two streets was embraced in and formed part of one and the same general plan.

We can not yield to the doctrine that a municipal corporation is to be deemed a trespasser, and liable as such, where the improvement of a street is ordered pursuant to an accepted plan and by a duly enacted ordinance, because there is some defect in the manner of awarding and evidencing the contract. There is no reason for applying to a case in which the corporation is sued as a trespasser the same rule as that which obtains in cases where there is an effort to enforce a summary statutory remedy for the collection of a local assessment. The cases are altogether dissimilar. The fact, that the advertisement was for a period of one day or two days less than the time prescribed, ought not to be allowed to put upon the corporation the liability of a trespasser. Nor ought the failure of the contractor to give bond, or of the clerk to make the proper record of the vote, to have any such effect. It is imposing an unreasonable burden upon municipal corporations to require them in all cases to proceed in exact accordance with the provisions of the sections of the charter which confer authority to collect the cost of improving streets from the adjacent lot owners. No good purpose is subserved by the imposition of such a burden. The omission of some matter, such as the failure to record the vote, resolution or ordinance, can not do the property owner who sues for the trespass any possible harm. Whether the advertisement was in strict accordance with the law, or whether the contract was signed by the contractor, or such like matters, can not, in any way, impair the rights of one whose property is affected by the improve-

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ment of the street. It is, of course, otherwise where the corporation seeks to impose upon the property owner the burden of paying for the improvement.

The 68th, 69th, 70th and 71st sections of the general act for the incorporation of cities are intended to apply to cases where the municipal corporation seeks to compel the lot owners to pay the expense of improving the street upon which their lots abut. They were not intended to limit the general powers conferred by other provisions of the statute. It has been decided over and over again by this court that the municipal corporation has plenary power over the streets and highways within its corporate limits. In one case it was said: "It has full authority to repair the streets, and construct drains and sewers. If it does this with proper skill and care, and without malice, as the paragraph alleges in substance, and consequential injury results to the citizen, he has no remedy." *City of Vincennes v. Richards*, 23 Ind. 381. In *Wood v. Mears*, *supra*, the court quoted the following from the general act: "The common council shall have exclusive power over the streets, highways, alleys, and bridges within such city, and to lay out, survey, open, straighten, widen, or otherwise alter the same, to make repairs thereto, and to construct and establish sidewalks, crossings, drains and sewers;" and said: "This section confers upon the common council plenary power over the streets and alleys of the city." There are many cases in which this rule is declared and enforced. If the provisions of the 67th, 68th, 69th and 70th sections were removed from the statute, there would remain ample power to grade and re-grade streets. There are very many provisions conferring this authority. The authority to make the improvement exists without the sections cited, but without them the expense would have to be borne by the municipality. They were not intended to confer general powers to improve, but were intended to invest the corporate officers with authority to collect the expense from owners of property abutting on the street.

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If the authority to improve streets is to be strictly confined within the limits assigned in the instructions of the trial court, then the city would have no authority to order it to be done by the street commissioner, or any other officer. If there is no other authority than that conferred by the sections granting the right to tax property owners with the cost of the improvement, then the corporation has no general power at all over its streets and highways. This can not be the rule.

A corporation, with ample general authority to improve streets, can not be deemed a trespasser because the proceedings are not in strict compliance with the provisions of the statute regulating *proceedings in cases* where the improvements are to be made, not at the expense of the municipal treasury, but at the expense of individual property owners. This seems so plainly right upon principle that support is not needed from adjudged cases. There is, however, a case in our own reports which declares this doctrine. In *The City of Terre Haute v. Turner*, 36 Ind. 522, the complaint was, in its essential features, similar to that in this case, and the defendant's answer was, so far as concerns the question in hand, substantially, as follows: That the common council of the said city, during the last summer, considered it was necessary, and that public convenience required, that said street in front of said warehouse should be so graded as to render the street uniform, and by a two-thirds vote ordered that said street be so graded and gravelled; that said order, with the yeas and nays thereon, was duly entered upon the record as a part of their proceedings; that pursuant to said order the defendant caused the work to be done. It will be observed that this answer does not aver that there was an advertisement for proposals; nor does it aver that any contract was awarded nor that a bond was executed. This answer was held good, and the judgment reversed because a demurrer was sustained to it in the court below. The ruling in the case under immediate mention is the correct one, and is in direct conflict with many of the expressions contained in the opinion in *City of Delphi v.*

Evans, supra, but is not in conflict with the decision of the court upon the point in judgment.

The appellants asked, and the court refused, the following instruction: "If you find from the evidence that the common council of the city of Aurora established the grade of the street in question; that a plan for such grade was fixed, and stakes set on the street indicating the depth of excavation to make the proper grade; that such plan for the grade of the street was accepted by the common council on the fifteenth day of September, 1876, and that on that day the common council passed an ordinance by a two-thirds vote of the council for the grading of the street according to the specifications of the said plan for the improvement; that the common council caused the work to be done by Thomas L. Chrisman; that he removed the earth from the street, and graded the same in conformity with the plan so fixed for the improvement of the street; that the work was done carefully and skilfully, doing the property of the plaintiff no unnecessary injury, and that in grading said street plaintiff's lot was not interfered with, and that the common council were not actuated by malice or ill-will toward the plaintiff in adopting said plan and in making said improvement; your verdict should be for the defendant."

This instruction is, in the main, a correct statement of the law, but in one particular is erroneous. It does not correctly state the law upon the question of the right of the city to remove the soil from Square street. The city, as we have already said, had no right to remove the soil, unless it was necessary for the improvement of the street, nor had it any right to use the earth taken from the street for any other purpose than that of grading streets forming part of the same general plan of improvement.

In one of the instructions it was said: "If the jury find that the common council ordered that a survey be made of Square street, fixing the grade and plan of improvement thereon, and that a competent person performed such duty,

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and reported in writing a plan for such improvement, and that the common council simply accepted said survey and plan, but did not adopt the same, then, and in that event, it can not be claimed that a grade and plan for the improvement had ever been established by the city." This statement does not correctly express the law applicable to the case made by the evidence. It appears from the evidence that the common council directed that a plan should be prepared; that one was prepared and reported, and that at the time it was reported the following order was entered upon the record of the common council: "The survey and plan for the improvement of Square street by N. T. Jacqueth is accepted." The form of words used by the council is immaterial; the material thing is their determination. The mode of expression is unimportant; the conclusion arrived at is the important and controlling thing. The order accepting the plan shows very clearly the determination of the municipal legislature, and this is enough. In such a matter as this no formal ordinance is necessary. An ordinary order is sufficient.

Judgment reversed.



78	10
134	246
78	10
146	403
78	10
149	490

No. 9043.

THE CONNECTICUT MUTUAL LIFE INS. CO. ET AL. v. ATHON.

MARRIED WOMAN.—*Alienation of Real Estate.*—A woman can not, during the existence of a second or subsequent marriage, alienate real estate acquired and held by her in virtue of a previous marriage.

SAME.—*Effect of Conveyance.*—*Practice.*—*Action to Quiet Title.*—*Foreclosure.*—A., a married woman, held in virtue of her former marriage the undivided one-third part of a lot in the city of Indianapolis; during her second marriage, A. and her then husband sold and conveyed, by a warranty deed, the interest so held by her in said lot to one L., and received from him the purchase-money therefor; L. entered upon and took possession

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of such interest in said lot, under said warranty deed, and had not and did not claim any other or different title thereto; L. and his wife executed a mortgage covering such interest in said lot, without the knowledge or consent of A., and without notice thereof to her until long after its execution. Action to foreclose the mortgage.

Held, that, in so far as the interest held by A. in said lot in virtue of her previous marriage was concerned, the warranty deed of A. and her then husband did not, and could not, under the provisions of section 18 of the statute of descents, operate as a conveyance of such interest to L., but, for that purpose, was inoperative and void.

Held, also, that A., as a defendant in such suit, had a clear and legal right to ask, by counter-claim or cross-complaint, that the question of her title to the interest so held by her in said lot might be determined and quieted.

From the Marion Superior Court.

W. Wallace, L. Wallace, J. W. Gordon, R. N. Lamb, S. M. Shepard, A. T. Beck and T. L. Sullivan, for appellants.

J. B. Black, for appellee.

Howk, J.—We take the following statement of this case, which is substantially correct, from the brief of appellants' counsel:

One John Dustman died April 30th, 1855, intestate, leaving said Levenia as his widow, and Carrie A. and Mary L. Dustman, minors, as his children, seized in fee simple of Lot No. four (4), in square No. twenty-two (22), in the city of Indianapolis.

Afterwards, in 1856, said Mary L. died intestate, and without issue, leaving as her heirs at law her mother, said Levenia, and her sister Carrie A., who inherited her portion of said lot. Afterwards, and before any conveyance was made of said property, on the 15th day of December, 1867, said Levenia intermarried with Dr. James S. Athon, and remained his wife until his death, on the 25th day of October, 1875. On the 22d day of May, 1872, during the existence of the marriage relation with said Athon, said Levenia sold, and with her husband, said James S. Athon, conveyed by deed of warranty the interest of said Levenia in said lot to William L. Lingenfel-

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ter, and on the same day said Levenia, as guardian of said Carrie A. Dustman, conveyed the interest of her ward to said Lingenfelter. (The legality and regularity of said last named conveyance is not questioned.) That said Lingenfelter paid for the entire lot the sum of \$7,625, of which said sum said Levenia was entitled to one-half, in her own right, and the other half as guardian of said Carrie.

The whole sum of \$7,625 was, however, paid over to, used and appropriated for the benefit of said Carrie A.; and said James S. Athon received no part thereof, directly or indirectly; and that, at the time of the execution of said deeds, said Levenia was above the age of eighteen years. That by virtue of said deeds said Lingenfelter entered upon and took possession of the entire lot and claimed title thereto, and had no other or different title. Afterwards said Lingenfelter and wife executed and delivered to said Connecticut Mutual Life Insurance Company the mortgage sued on, and said Levenia did not unite in or consent to its execution, and did not know of its existence until long thereafter.

That James S. Athon left a will, and appointed John M. Lord as his executor, who duly qualified as such, and was, at the time of the commencement of this suit and proceedings herein, such executor.

This action was commenced in the superior court of Marion county, by appellant, the Connecticut Mutual Life Insurance Company, to foreclose a mortgage on lot No. four (4), in Square No. twenty-two (22), in the city of Indianapolis, executed by appellants Lingenfelter and wife to said company. To which action said William L. and Margaret C. Lingenfelter, Levenia D. Athon, William W. Ball, James B. Black, William G. Lockwood, Citizens' National Bank of Indianapolis, and George P. Bissell, Trustee, were defendants. All the defendants filed answer; and defendant Levenia D. Athon filed a cross complaint making plaintiff and her co-defendants parties defendants thereto; in which said cross-complaint she ad-

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mits the execution of the notes and mortgage, and that said mortgage was duly recorded.

But she says that at and before the time when said notes and mortgage were executed she was, and has since continued to be, the owner in fee simple of the undivided one-third of said Lot No. 4, Square 22, as tenant in common with said William L. Lingenfelter, and as such entitled to possession thereof, and did not join in or consent to the execution of said mortgage, nor have knowledge thereof, until long after its execution. And further, that said property is not occupied by either Lingenfelter or herself, but by tenants who pay rent to Lingenfelter, who is insolvent. Wherefore she says that said mortgage is void as to her one-third, and that said company and Lingenfelter have not, nor has either of them, any interest in her said undivided one-third part of said lot; wherefore she prays for process, etc.; and if said mortgage be foreclosed, that her said one-third interest be protected, etc.; and for a receiver to collect rents and pay one-third thereof to her, and the rest due remain subject to order of the court; *and that her title to said undivided one-third interest be quieted, and for all other proper relief.*

After this cross-complaint was filed, defendant William L. Lingenfelter gave said Lord, as executor of said estate of Athon, notice that his title to an undivided one-third of said lot was attacked, and calling upon said executor to defend the same; and that if said Levenia should succeed in her claim, he would hold said estate on the warranty deed of said Athon.

Thereupon, said Lord made application to be made party to such suit, which application was granted; and thereupon said Lord appeared and filed answer to the cross-complaint of said Levenia, in substance, as follows:

First paragraph, general denial.

Second, that, on the twenty-second day of May, A. D. 1872, said Levenia D. Athon, then the wife of said James S. Athon, deceased, was the owner and in the possession of an undivided one-half of said premises, and being such owner

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she, on that day, sold the same for the sum of seventeen hundred and fifty dollars, and thereupon said Levenia D. and James S. Athon jointly executed and delivered to said Lingenfelter their deed of warranty for the said premises, said Levenia then and there being above the age of eighteen years, and the wife of said James S. Athon, and that said Levenia D. then and there received the consideration of such sale and converted the same to her own use. Wherefore defendant says, that Levenia D. has no right to, or interest in, said premises or any part thereof.

To this answer the said Levenia D. replied, in substance, as follows:

The seizin and death of John Dustman leaving said Levenia, his widow, and Carrie and Mary, his children, and the subsequent death of Mary without issue and intestate, leaving her mother and sister as heirs; the subsequent marriage of Levenia and Dr. Athon, December 15th, 1867; the conveyance of Athon and wife of one-half and the other half by Levenia, as guardian, to said William L. Lingenfelter by deeds of warranty; the payment by Lingenfelter of purchase-money to Levenia, who appropriated the same for the use and benefit of said Carrie A.; that no part of said money was used by Athon; that at the time of the execution of said deeds, said Levenia was over eighteen years of age; that Lingenfelter entered upon, and took possession by virtue of said conveyance, and not otherwise, and has not nor does he claim any other or different title; the execution of mortgage by Lingenfelter and wife to the Connecticut Mutual Life Insurance Company, without the knowledge or consent of said Levenia, and that she had no notice thereof until long thereafter. Wherefore she says she is the owner of one-third of said premises described in the complaint, etc. To which reply said Lord, as executor, demurred for insufficiency of facts, etc. Demurrer overruled by court and excepted to. Answers by other parties, which are not material in the consideration of this case.

The cause was submitted to the court for trial on an agreed

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statement of facts as evidence, wherein substantially the same facts were set forth as were stated in the pleadings, the substance of which we have given. Upon this statement of facts the court, at special term, found for the appellant, the Connecticut Mutual Life Insurance Company, for the amount due on its notes in suit, and that the mortgage described in its complaint was a valid lien upon the undivided two-thirds part of the mortgaged premises; and that the appellee, Levenia D. Athon, was the owner in fee simple of the undivided one-third part of said premises, free from the lien of the mortgage in suit, and was entitled to the relief prayed for in her cross-complaint. The appellants, the Insurance Company, Lingenfelter and Lord, executor, etc., jointly, and the said Insurance Company and said Lord, executor, etc., separately, moved the court for a new trial, assigning in each of said motions the same causes for a new trial, namely, that the finding of the court was not sustained by sufficient evidence, and that it was contrary to law. These motions were severally overruled by the court, and several exceptions were duly saved to these rulings; and thereupon the court rendered its judgment and decree upon and in accordance with its said findings. The judgment and decree, on appeal, were affirmed by the court in general term; and from this judgment of affirmance this appeal is now here prosecuted.

By a proper assignment of error, the appellants have brought before this court the following errors assigned by them in the court below, in general term, to wit: The court at special term erred:

1. In overruling the demurrer of John M. Lord, executor, etc., to the reply of appellee, Levenia D. Athon, to said Lord's answer to said appellee's cross-complaint; and,
2. In overruling the motion of said Lord, executor, etc., for a new trial.

The questions presented by these alleged errors depend, for their proper decision, upon the construction which must be given to the provision of section 18 of "An act regulating

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descents and the apportionment of estates," approved May 14th, 1852. This section reads as follows:

"Sec. 18. If a widow shall marry a second or any subsequent time holding real estate in virtue of any previous marriage such widow may not, during such marriage, with or without the assent of her husband, alienate such real estate, and if, during such marriage, such widow shall die, such real estate shall go to her children by the marriage in virtue of which such real estate came to her, if any there be." 1 R. S. 1876, p. 411.

This section of the law of descents has often been the subject of consideration by this court, and it has been uniformly held, so far as we are advised, that any deed or mortgage executed in contravention of the provisions of said section was absolutely null and void, and conveyed no title, interest or estate, in or to the real estate held "in virtue of any previous marriage," to the grantee or mortgagee. In *Vinnedge v. Shaffer*, 35 Ind. 341, after quoting said section 18, the court said: "This statute ties up the hands of a woman during a second or subsequent marriage, and restrains her, during such marriage, from alienating real estate received by her in virtue of a former marriage. * * The object of the statute seems to be two-fold, first, to protect a woman who has thus received real estate by virtue of a former marriage from improvident and injudicious alienations thereof during a second or subsequent marriage, and second, to preserve the property for the children of the marriage in virtue of which she received it, where there are such children, in case of her death during such second or subsequent marriage. * * We are of opinion that both the letter and spirit of the statute in question prohibit any alienation of the property, whether for life or in fee, absolutely or contingently, by a woman, under the circumstances stated." To the same effect are the following cases in this court: *Bowers v. Van Winkle*, 41 Ind. 432; *Schlemmer v. Rossler*, 59 Ind. 326; *Edmondson v. Corn*, 62 Ind. 17; *Unfried v. Heberer*, 63 Ind. 67; *Scott v. Greathouse*, 71 Ind. 581;

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Sebrell v. Hughes, 72 Ind. 186 ; *Smith v. Beard*, 73 Ind. 159 ; *Avery v. Akins*, 74 Ind. 283 ; *Mattox v. Hightshue*, 39 Ind. 95.

Applying the doctrine of the cases cited to the agreed facts in the case at bar, the conclusion is inevitable, that the deed executed by the appellee, Levenia D. Athon, and her then husband, James S. Athon, to the appellant William L. Lingenfelter, on May 22d, 1872, was absolutely void and of no effect, in so far as it attempted to convey the one-third interest in the mortgaged premises, which the appellee held therein in virtue of her previous marriage to John Dustman, deceased.

But the appellant's counsel say that, "whatever may be the rights of Mrs. Athon, in an action of ejectment for possession, or an action in that nature, we submit that in the case at bar it should be different. Here, she is in a court of equity asking equitable relief, such as the appointment of a receiver and to have her title quieted. * * Now, it is a familiar rule in equity, that he who seeks the aid of equity must come into court with clean hands. *Creath's Adm'r v. Sims*, 5 Howard, 192. Or, as stated differently, he that seeks equity must first do equity. 1 Story's Eq. Jur., sec. 64. Nor will equity interfere in opposition to conscience and good faith. *Lewis v. Baird*, 3 McLean, 56. Now, how does Mrs. Athon stand in the light of these equitable maxims? She comes into court with the admission that she once sold this lot and received the full price therefor, and used the same for the benefit of her daughter; and, without tendering back the money or offering to do so, she asks of this court equitable relief. Is she in a position to invoke the aid of the chancellor? Is this a clean hand she is holding out for this property, while she holds in the other the full, fair value of the property? Does the conscience of the chancellor move toward such an exhibition of good faith? Are there any symptoms of good faith, and an effort to do equity before asking it?"

We have given the appellants' learned counsel the benefit

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of a full statement of their argument, on the point they make therein, as well because the argument is well and forcibly made, as because the point made seems to be the only one on which they apparently rely for the reversal of the judgment below. We do not think, however, that this point is well taken. The record of this cause shows that the appellee, Levenia D. Athon, came into the court below to defend this suit, which the appellant, the Insurance Company, had commenced there against herself and others. She was not a party to the notes and mortgage sued upon, and had no knowledge of their execution. Under the law, she was the owner in fee simple of the undivided one-third part of the lot described in the mortgage in suit, notwithstanding the admitted fact that she and her second husband, James S. Athon, had sold and conveyed, or attempted to convey, her said interest in said lot, by a deed which was void and of no effect as to such interest. In defending said suit, therefore, she set up her exact legal rights in the mortgaged premises. The insurance company and Lingenfelter claimed title to the whole of said premises, adversely to the interest of said Levenia D. Athon therein; and, therefore, under the code, she had a clear legal right to ask, by counter-claim or cross-complaint, that the question of title might be determined and quieted. The ethics of the parties to this case are not properly before us; but the law of the case, as it seems to us, is with the appellee.

Upon the whole case we are of the opinion, that, under the law of this State, the court below in general term did not err in affirming the judgment of the special term.

The judgment is affirmed, at the appellants' costs.

NOTE.—ELLIOTT, C. J., took no part in the decision of this cause.

Turner et ux. v. The First National Bank of Madison.

No. 7099.

TURNER ET UX. v. THE FIRST NATIONAL BANK OF MADISON.

78	19
130	180
78	19
130	197
78	19
144	221

REAL ESTATE.—*Action to Recover.*—*Evidence.*—*Judgment.*—*Harmless Error.*—

In a suit for the possession of real estate, by the purchaser at a sale on execution against the execution defendant, the judgment entry is sufficient proof *prima facie* of the judgment, and the pleadings need not be put in evidence, though, if admitted, the error is harmless.

SAME.—*Sheriff's Sale.*—*Assignee of Certificate.*—*Evidence.*—*Title in Stranger.*—

In a suit for the possession of real estate, brought by the purchaser at sheriff's sale against the execution defendant, the defendant is not permitted to prove title in a stranger, and the assignee of the sheriff's certificate, who receives a sheriff's deed thereon, is, in legal effect, the purchaser at the sheriff's sale, within the meaning of this rule.

SAME.—*Receipt.*—*Execution.*—*Res Gestæ.*—*Harmless Error.*—*Semble,* that a

receipt from a judgment plaintiff to the sheriff for the proceeds of lands sold on execution issued on a judgment is competent evidence as a part of the *res gestæ*, in an action by the purchaser against the execution defendant for possession of the lands; but, in any event, such evidence is harmless.

EXECUTION.—*Sheriff's Return.*—*Amendment.*—It is lawful for one who, as

sheriff, executed process, to amend his return, by leave of the court, even after the expiration of his term of office.

NATIONAL BANK.—*Right to Hold Real Estate.*—A national bank has au-

thority to take title to real estate in discharge of indebtedness previously contracted.

PRACTICE.—*Instructions.*—*Evidence.*—It is the duty of the court, by in-

structions, to construe record and other written evidence in the cause, and to state its effect.

SHERIFF'S DEED.—*Date.*—*Delivery.*—The date of a sheriff's deed is *prima*

facie evidence of the time of its delivery.

From the Jefferson Circuit Court.

E. R. Wilson, for appellants.

C. A. Korbly, for appellee.

NIBLACK, J.—The First National Bank of Madison brought this action against William S. Turner and Eliza A. Turner, his wife, to recover the possession of, and to quiet its title to, an eighty-acre tract of land in Jefferson county.

Both defendants answered in general denial.

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Mrs. Turner also filed a cross-complaint against the plaintiff and her co-defendant, alleging that, on the 7th day of October, 1859, her husband and co-defendant purchased the land described in the plaintiff's complaint, together with other lands, for the sum of two thousand dollars, and received a deed of conveyance therefor; that previous to his said purchase he procured from her the sum of five hundred dollars, to be paid as purchase-money, and which was paid as such, on said lands, and in consideration thereof it was agreed by her said husband that said money should be a lien on said lands for the repayment of the same to her, with ten per cent. interest thereon, he to pay, and having since paid, the remainder of the purchase-money out of his own private means; that her husband was to hold said lands in trust for her until she was reimbursed for the money so advanced by her, and interest thereon, of all which the plaintiff had notice; that said sum of five hundred dollars, or any part thereof, had never been repaid to her. Wherefore she demanded that a lien against the land claimed by the plaintiff be decreed to her, and that she might have all other proper relief.

Issue was joined on the cross-complaint.

A jury returned a general verdict for the plaintiff.

The defendants severally interposed a motion for a new trial, both assigning the same causes, and also moved in arrest of judgment; but their motions were, each in its order, overruled, and the plaintiff had judgment on the verdict.

Error is assigned upon the overruling of the motion for a new trial.

The plaintiff, to establish its title to the land, relied upon a sheriff's sale made upon a judgment of the Jefferson Circuit Court, in a suit in which the State, on the relation of one Roberts, as guardian, was plaintiff, and the defendant William S. Turner and others were defendants.

Before offering that judgment in evidence, the plaintiff, over the objections of the defendants, introduced and read in

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evidence certain papers purporting to be the complaint, answer and reply in the cause in which it was rendered.

It is objected that these papers were not properly identified before they were so introduced and read, and that the record of a cause can not be put in evidence in such a fragmentary form. It is proper for a party offering a judgment in evidence, to first read the pleadings in the cause, to show that the court had jurisdiction to render the judgment. But in a case like this it is unnecessary to put the pleadings in evidence upon which the judgment was rendered.

As between the purchaser at a sheriff's sale and the execution defendant, it is only necessary to show the judgment, the execution, the sale and sheriff's deed. *Shipley v. Shook*, 72 Ind. 511; *Mercer v. Doe*, 6 Ind. 80; *Frakes v. Brown*, 2 Blackf. 295; *Armstrong v. Jackson*, 1 Blackf. 210 (12 Am. Dec. 225); Rorer Judicial Sales, sec. 807. Waiving all discussion of the specific objections urged to the reading of the complaint, answer and reply, as above stated, it is evident that the appellants were not injured by the introduction of those papers in evidence.

It was made to appear by the evidence that one Graham was the sheriff who sold the land in suit upon execution, and that one Comely became the purchaser; that Comely borrowed the money of the appellee with which to pay the purchase-money; that one Whitney, an officer of the bank, became the surety of Comely for the repayment of the money so borrowed; that Comely assigned his certificate of purchase to Whitney to indemnify him as such surety; that Comely made default in such repayment; that thereupon Whitney assigned the certificate of purchase to the appellee in payment, or to secure the payment, of the money borrowed by Comely; that afterward the appellee demanded, and received, a sheriff's deed from one Gavitt as the successor of Graham.

The appellants contend that, under all the circumstances disclosed by the evidence, the appellee was prohibited by the national bank act from accepting an assignment of the certifi-

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cate of purchase, and from taking a deed to the land in controversy, and that hence the appellee derived no title from the sheriff's deed. We do not, however, construe the prohibition against the general power of national banks to acquire real estate as strictly as the doctrine contended for by the appellants would require us to construe it. A more liberal construction is given to that prohibition by the Supreme Court of the United States in the case of *National Bank v. Matthews*, 98 U. S. 621.

Besides, the appellee received a conveyance to the land in discharge of a debt previously contracted, which is one of the methods by which a national bank is expressly authorized to acquire real estate. U. S. Rev. Stat., sec. 5137.

The appellants, as a part of their defence, offered to prove that the certificate of purchase was assigned by Whitney to the appellee as collateral security merely for the debt owed by Comely, but the court would not permit the proffered proof to be made, and that ruling is also complained of by the appellants.

Proof of an outstanding title in some third person will, ordinarily, defeat an action for the recovery of real estate, but in an action by a purchaser at sheriff's sale against the execution defendant, the latter is not, as a general rule, permitted to set up title in a third party as a defence against the purchaser's right to recover. *Hobson v. Doe*, 4 Blackf. 487; *Sherry v. Denn*, 8 Blackf. 542; *Calloway v. Doe*, 1 Blackf. 372; 3 Wait's Actions and Defenses, 112, and authorities there cited.

A sheriff's certificate is assignable, and the assignee stands in the place of, and becomes in legal effect, the purchaser at the sheriff's sale. *Splahn v. Gillespie*, 48 Ind. 397. The appellee was therefore the purchaser at sheriff's sale of the land of the appellants, within the meaning of the rule laid down as above.

If, however, the proposed evidence had been admitted, it could, at most, have only shown that the appellee held the

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land described in the sheriff's certificate as the trustee of Comely, and this would not have defeated the appellee's right, as the holder of the legal title under the sheriff's deed, to recover the land thus held by the appellee.

On the trial the appellee, as a part of its evidence in chief, offered the return made by Graham, as sheriff, to the execution on which he sold the land. This return, being objected to, was then withdrawn. Afterwards, the execution, with an amended return, was offered and admitted in evidence, over several objections urged by the appellants.

The bill of exceptions contains the following statement as to the amendment of the return and its admission in evidence as amended :

"And for the purpose of fully and properly presenting the question of the admissibility of said execution and said amended return upon said objections of the defendants thereto, it was agreed and admitted by the parties that the following facts were true and should be considered by the court in determining said questions, viz.: That said writ and original return thereto first offered to be given in evidence by plaintiff was filed in the clerk's office by James Graham, the then sheriff of said county, on the 26th day of April, 1875, and was by the clerk then recorded in execution docket 'G' therein, on page 147. That James Graham's term of office as sheriff expired in August, 1875, and that he has not been sheriff since, or in any other way since connected with the sheriff's office. That said amended return was made by him during the trial of this cause, and since the original return was offered in evidence by the plaintiff; that he so made said amended return at the request of Mr. Korbly, counsel for the plaintiff, by leave of court first obtained; that, at the time he so made it, he was not the sheriff, or acting in any official capacity under the sanction of an oath; other than the oath he took as sheriff, his official oath, and the court taking into consideration all of said matters, so admitted, overruled said objections."

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The objections urged to the admission of the amended return are :

1st. That as the original return had become a matter of record, and as Graham's term of office had expired, the amendment was wholly unauthorized, whether made with or without leave of court.

2d. That the court, in any event, had no power to authorize an amendment of the original return after it had been entered of record without notice to all persons who might be affected by the proposed amendment.

It may be regarded as well settled in practice in this State, that a sheriff may, by leave of the court, amend his return in a given case, so as to make it conform to the facts as they occurred, after his term of office has expired. *Dwiggins v. Cook*, 71 Ind. 579.

But it is not so well settled as to when, if ever, such leave of court can only be granted upon notice to the parties interested in the subject-matter of the return sought to be amended. *Freeman Executions*, sec. 358 ; *Herman Executions*, p. 398.

The question as to whether this is a case in which notice ought to have been given of the application to the court for leave to amend the return is not raised by the record, and is hence not properly before us.

The agreed statement of facts reserved no question as to the manner in which the court granted leave to make the amendment objected to, as nothing is said in that statement as to the circumstances under which the leave was obtained, and as no exception seems to have been reserved to the granting of the leave now complained of. For aught that appears, full notice of the application for leave may have been given, and we must assume that the court did not transcend its powers in granting the leave.

At the trial, in connection with the testimony of Graham concerning the sale of the land on execution, a receipt from Roberts, the relator in the judgment, to him as sheriff, for a sum of money derived from that sale and other sales on the

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same execution, was read in evidence over the objection of the appellants, and of that they still complain.

That receipt appears to us to have been competent as a part of the *res gestæ*. At all events, we are unable to see that the appellants were in any manner injured by its introduction in evidence.

The court, in substance, instructed the jury that the judgment, execution, amended return and sheriff's deed were, taken in connection with some other matters referred to, sufficient to make out a *prima facie* case for the appellee.

The appellants argue that this was, in effect, taking the case away from the jury, and consequently wrong.

It was the duty of the court to give a construction to the record and other written evidence in the cause; and, as no valid objection has been shown to any of them, the instruction gave the judgment, execution, amended return and sheriff's deed the only construction which the court could have properly given them as evidence before the jury.

The appellants also reserved exceptions to the third, fourth, fifth, sixth, seventh, eighth and ninth instructions given by the court at the request of counsel for the appellee, but no specific objection has been pointed out to any one of those instructions.

The court also instructed the jury that the date of a deed is *prima facie* evidence of the date of its delivery, and in that we think the law was correctly stated as applicable to the subject to which the instruction related.

Mrs. Turner's cross-complaint was not well sustained by the evidence. In relation to some of its most material averments, the evidence was quite uncertain and unsatisfactory.

We would not, therefore, be justified in holding that the verdict was not sustained by the evidence.

Such a trust as that set up by Mrs. Turner can not prevail against the face of the deed, unless it be fairly and clearly established by the evidence.

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Other questions have been either argued or suggested by the appellants, but what has been said practically disposes of all matters that have been fully presented and argued as reasons for the reversal of the judgment.

Error is also assigned upon the refusal of the court to arrest the judgment, but no argument has been submitted in support of that assignment of error.

The judgment is affirmed, with costs.

No. 7755.

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78	26
127	464

78	26
131	266
132	536

78	26
149	39

78	26
171	405

PARTNERSHIP.—Retiring Member.—Continued Liability.—Duty to Give Notice.—One whose membership in a partnership has been publicly advertised in the community where the business has been and is prosecuted owes a duty on retiring to give notice thereof, not merely to former customers, but to the public, who may give future credit on his supposed responsibility.

SAME.—Estoppel.—Where a retiring partner fails to give notice of his retirement, his liability continues on account of such failure, and he is estopped from denying his liability to those who give the concern credit on the faith of his supposed connection.

SAME.—Negligence.—It is immaterial whether the failure to give the notice was wilful or negligent, or was the result of causes unforeseen and beyond control.

SAME.—Certificate of Deposit.—Banking Company.—Pleading.—A complaint on a certificate of deposit, issued by an unincorporated banking firm, is good against a defendant, which shows his connection with the firm and the public advertisement of the fact prior to January, 1874, the want of published notice of his retirement, and that the plaintiff, who had known of his membership, but not of his retirement, in February, 1876, made the deposit sued for in the usual course of business, and in the belief that the defendant was yet a member of the firm, though the plaintiff had had no dealings therewith while the defendant was in the firm.

SAME.—Pleading.—In such case the defendant was liable to the plaintiff, if at all, as a maker of the certificate, because estopped to deny his membership in the firm, and consequently liable on those paragraphs of the complaint which charged him as maker.

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SAME.—Evidence.—Under the sworn denial of such paragraphs, the facts concerning the defendant's withdrawal, his failure to give notice of it, and the plaintiff's knowledge on the subject, were all admissible. The other paragraphs were unnecessary.

SAME.—Presumption.—There was no legal presumption that the defendant had ceased to be a member of the firm, which continued in business at the same place and under the same name, because he stopped a newspaper notice of his connection.

SAME.—Notice of Dissolution.—Continued liability is escaped, not, by the partner ceasing to hold himself out as such, but by giving affirmative notice of the dissolution of the firm, or of his withdrawal.

SAME.—Public Advertisement of Membership.—A member of a partnership is responsible for the public advertisement of his membership in the place of his residence and of the firm's business, though done by his partners without his personal knowledge; and, after his retirement, he will be responsible for the continued publication of the advertisement, though without his knowledge. The mere stopping of such publication when he learned of it was not enough. He was bound to publish such unequivocal notice as he could to prevent further misunderstanding.

SAME.—Evidence.—Evidence that such partner had agreed with his co-partners to keep his retirement secret, and that he told different stories on the subject, was admissible upon the issue whether the appellant was in truth a member of the firm when the plaintiff made his deposits.

SAME.—Reports of Co-partnership.—Withdrawal.—Current report was not admissible to show the partnership; but it was competent on the subject of notice to the plaintiff of a partner's withdrawal.

SAME.—Corporation.—Stockholder.—There may be stockholders in a partnership. An advertisement which showed that the defendant and others were stockholders in the "People's Bank," and responsible for all its liabilities, showed it to be a partnership, rather than a corporation.

SPECIAL INTERROGATORIES.—Practice.—Defects Cured.—Special interrogatories in reference to particular facts within the issues may be submitted to the jury, but not questions covering entire issues. It is not error to refuse an immaterial interrogatory. Errors may be cured by the answers to interrogatories.

PLEADING.—Non Est Factum.—Practice.—When there is an answer of general denial, or *non est factum*, a special argumentative denial or *non est factum* might be properly struck out; but, if left in such plea does not demand or admit of a reply. The ruling upon a demurrer to a reply filed to such answer presents no question.

SAME.—While the code requires the complaint to state the facts which constitute the cause of action, it is not good pleading to anticipate matters of defence.

From the Miami Circuit Court.

Uhl v. Harvey.

M. Winfield, Q. A. Myers, D. C. Justice and W. D. Owen,
for appellant.

G. E. Ross, for appellee.'

WOODS, J.—Suit by the appellee against the appellant, Joseph Uhl, and others who have declined to join in the appeal. The action was based on four certificates of deposit, there being two paragraphs of complaint predicated on each certificate, and the difference between these paragraphs being that in one it is charged that the defendants, at the time of making the certificate, were partners, doing a banking business, under the firm name of "People's Bank," and as such, in the course of their business, executed to the plaintiff, for money deposited, the certificate sued on; while in the other paragraph, instead of charging that appellant, Uhl, was a member of the partnership when the certificate was made, it is sought to hold him as a retired partner who had failed to give notice of his withdrawal from the firm. The second, fourth, sixth and eighth paragraphs are drawn upon the latter theory, and as they are alike, excepting the dates and amounts of the certificates on which they are founded, we need copy but one, which is as follows:

"For amended eighth paragraph of complaint, the plaintiff complains of the defendants and says: That on the 1st day of January, 1874, and for more than a year previous thereto, the defendants were partners, doing business together under the firm name of 'People's Bank,' as private bankers in the city of Logansport, Indiana; that it was the business of said firm to receive money on deposit, and to pay interest on all moneys deposited at a rate agreed upon between the parties; that William H. Standley acted as president, and William H. Whiteside acted as cashier, of said firm; that said Whiteside, as cashier, was authorized by the members of said firm to receive money on deposit, contract for the rate of interest to be paid on such deposits, and to give the obligation of said firm for the payment thereof; that the defendant Joseph

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Uhl, during all that time, held himself out to the plaintiff, and to the public in general, as a member of said firm by public notice in a newspaper of general circulation, published in the city of Logansport, whereby the defendant Joseph Uhl, and each of the other defendants, held themselves out to the plaintiff, and the public in general, as individually responsible for all the liabilities of said firm; that on the 20th day of April, 1877, this plaintiff, who was personally acquainted with the defendant Joseph Uhl, and knew him to have been a member of said firm, and without any knowledge that he had ceased to be a member of said firm, and without any publication of notice of his withdrawal therefrom, and under the full belief that he still remained a member thereof, and relying upon the said Joseph Uhl continuing to be a member thereof, and upon his responsibility as such, deposited with said firm the sum of one hundred and forty dollars, for which sum the defendants gave their certificate of deposit of that date, signed by William H. Whiteside, as cashier, payable twelve months after date, with interest at the rate of eight per cent. per annum, whereby they promised to pay the plaintiff said sum of one hundred and forty dollars, with interest at the rate of eight per cent. per annum, twelve months after the date thereof, a copy of which is filed herewith, marked Exhibit D, as part of this complaint."

The certificates on which the other paragraphs are based bear date respectively, February 23d, 1876, and April 6th and 9th, 1877. Demurrers to each paragraph were overruled and exceptions saved. A verified general denial and other pleas were filed. There was, however, in the special pleas nothing which was not provable under the general denial, because the matters averred were inconsistent with the allegations of the complaint, and not in confession and avoidance thereof. No replies, therefore, were necessary or admissible, and the rulings on the demurrers to the replies which were filed present no question. *State, ex rel., v. Blair*, 32 Ind. 313.

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Indeed, as it seems to us, the issues in the case and the trial of it might well have been simplified, and the ends of justice correspondingly promoted, by the omission from the complaint of the second, fourth, sixth and eighth paragraphs. They are drawn upon a mistaken theory. While it is true, under the code, that the complaint must state the facts constituting the cause of action, this does not mean that a full history of the transaction out of which the action arises must be given. It is not commendable pleading to anticipate in the complaint matters of defence and reply thereto, as is done in the above named paragraphs. If the appellee was entitled to judgment against the appellant, it was because the appellant was bound by the contracts sued on, as if he made them. There is in the books and cases some confusion in reference to the principle upon which rests the responsibility of a retiring partner. *Parsons Partnership*, 411; *Gow Partnership* (3d Am. ed.), 240. In *Cregler v. Durham*, 9 Ind. 375, it is said: "He was not liable as a contracting party, because he was not, in fact, a member of the firm when the contract was made. Hence he was not a party to it. If liable at all, then, it must be upon the ground that the plaintiff had a right to treat him as a member, and give credit to him as such."

Here is a manifest inconsistency. The following is a better statement:

The general ground of liability of a person as a partner, who is not so in fact, is that he has held himself out as such to the world, or permitted others to do so, and that by reason thereof he is estopped from denying that he is one, as against persons who have in good faith dealt with the firm or with the person so held out as a member of it. *Reber v. Columbus, etc., Co.*, 12 Ohio St. 175; *Drennen v. House*, 41 Pa. St. 30; *Sherrod v. Langdon*, 21 Iowa, 518; 3 Kent Com. 66.

And it will not do to say, as has sometimes been done, *Gow, supra*, that the estoppel springs from the retiring partner's "negligent conduct in forbearing to give notice." The liability continues because of the failure to give the proper no-

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tice of retirement, and it is immaterial whether the failure was wilful or negligent, or arose from causes unforeseen and beyond control. If negligence were the test, then in all cases inquiry might have to be made into alleged excuses for the failure. But the rights of a creditor can not be made to depend on the result of such an inquiry. The only just rule is an absolute requirement that the retiring partner shall give proper notice of his withdrawal, and, failing to do so, from whatever cause, must suffer the consequences. There is no injustice in this. Better than any other he knows, or may be presumed to know, the risk of continued liability, and if the emergency requires it he can take the necessary steps to give special notice to any customer, old or new, until adequate general notice can be published.

Returning to the point under consideration, it was enough that the plaintiff should have charged the appellant as a maker of the certificates, as was done in the first, third, fifth and seventh paragraphs of the complaint, the sworn denial of which presented the whole question of liability, and made admissible all the evidence adduced, whether to show the partnership, the facts concerning the appellant's retirement, and the alleged failure to give notice thereof, or the appellee's knowledge on the subject. But on the strength of the answers of the jury to interrogatories, showing that the appellant had withdrawn and was not a member of the firm when the certificates were issued, the court, on the appellant's motion, gave judgment in his favor upon the last named paragraphs, and rendered judgment for the appellee upon the other paragraphs, whose sufficiency must therefore be determined, as though they alone constituted the complaint.

The substance of the objections made to them is, *first*, that it may be presumed, for aught that is averred, that from and after January 1st, 1874, the appellant, Uhl, ceased to hold himself out as a partner in the business; and that, after the lapse of so long a time, the appellee, who had not before had any transaction with the firm, had no right to presume on a

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continuance of his membership, the name of the firm being such as to afford no indication on the subject; and, *second*, that while the plaintiff avers want of knowledge of the retirement of the appellant, he does not deny knowledge that Standley, Atkinson, Whiteside or Thompson had retired, and that the firm had thereby been dissolved.

These objections are not sound. There is no legal presumption that the appellant ceased to be a member of a firm whose business continued uninterrupted, because he ceased to keep up a newspaper notice of his connection. Once the public were well informed of the membership of the firm, there was probably no profit in continuing to publish the notice; and the rule is that the retiring partner escapes continued liability, not by ceasing to hold himself out as a partner, but by giving affirmative notice of the dissolution, or of his withdrawal from the membership of the firm. As to the second point, the parties named are made defendants in the case, and the necessary inference from the allegations made is that they had continued in the partnership; and, in the absence of averment to that effect, there is certainly no presumption that others not named had come into the firm. The paragraphs show the appellant's connection with the firm, and the public advertisement of the fact prior to January, 1874, the want of publication of notice of his retirement, and that the appellee, who knew of his membership but not of his retirement, gave credit to the firm in the usual course of its business, in the belief that the appellant was a member, and this is enough to entitle the appellee to recover, notwithstanding he had had no dealings with the firm during the time when the appellant was a member. One whose membership in a business partnership has been publicly advertised in the community where the business has been and is prosecuted, owes a duty, on retiring, to give notice thereof, not merely to the customers who have had actual transactions, but to the public, who may be misled into giving future credit, on the supposed responsibility of him who retires. Parsons Partnership,

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412; Collyer Partnership, sec. 530; 1 Ewell's Lindley Partnership, 407, 415 and notes.

There was no available error in sustaining demurrers to any of the answers, because, as already stated, they contained nothing which was not provable under the sworn general denial. The answers to which the demurrers were overruled were nothing but special or argumentative denials of matters averred in the complaint, and might well have been stricken out; but, being allowed to stand, they closed the issue, and neither called for nor admitted of reply. *State, ex rel. Griswold, v. Blair, supra.*

Exceptions were saved to a number of the instructions given to the jury.

The objection made to the fourth is not well founded in fact. As stated in the brief, the last clause of the instruction reads, "but the law does require that he make his retirement as notorious as was the fact of his membership." The record, however, shows that the court gave it in this wise: "That he should use all reasonable efforts to make his retirement as notorious," etc., which is plainly quite a different proposition, but whether right or not we need not decide, because not discussed in the brief.

The sixth instruction, after enunciating a rule in general language, to which no objection is made, proceeds as follows: "So in this case, if the defendant Uhl, by his words or conduct, induced the plaintiff to believe him to be a member of the People's Bank, and the plaintiff, upon such representations, made the deposits evidenced by the certificates sued on, he is liable as fully as if he were in fact a member, for he negligently left the plaintiff to believe him still a member, and to deal with the firm upon that belief, and I state it as the law in this case, that it is not necessary that the defendant Uhl personally made such representations; but if the plaintiff deposited his money with the said People's Bank, and previous to that time it was a matter of public notoriety

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that defendant Uhl was a member of said firm, and such notoriety originated through him, *or his co-partners*, in that case it is his duty to prove that he informed the public of his retirement, and if he has failed to do that, then the public was justified in believing him to be a member."

In this connection it may be stated that the appellant has saved his exception to the refusal of the court to give the following instruction :

"No. 17. If you find that these advertisements were made without the knowledge or consent of Uhl, and he, as soon as he heard of them, caused them to be taken out of the papers, then I charge you as the law that he is not bound by them. No person is bound by the act of another, unless done by his authority, or with his knowledge without objection."

The position of the appellant, in reference to the instruction given, is sufficiently indicated by the terms of that which was refused ; and if, as claimed, the jury was in effect instructed or led to suppose that the appellant might be held responsible for acts which he neither did nor authorized another to do, and had no knowledge of their being done, we could not hesitate to declare that material error had been committed. But, properly construed, with reference to the evidence in the case, it is clear that by the notoriety mentioned as having "originated through him or his co-partners," reference was had to the acts of himself or co-partners while they bore that relation to each other ; and the proof being clear and undisputed that the appellant lived in Logansport, where the business was conducted, and where he was publicly advertised as a stockholder, and with the other stockholders as personally responsible upon the liabilities of the company, he was clearly responsible for the notoriety so produced, whether he or his partners caused the advertisement to be put into the daily paper where it was published. The evidence went farther, however, and showed that the advertisement, a copy of which will be given further along, was kept in the paper after the appellant's withdrawal

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and until March, 1876, or later, when, upon the order of the appellant, it was stopped, or his name omitted therefrom; and it is to this fact that the instruction, which the court refused to give, was intended by the appellant to be addressed. But the instruction was wrong and was properly refused. It was the unquestioned duty of the appellant to give notice of his retirement immediately upon its occurrence, if not in anticipation of the fact, and this duty certainly included the corresponding obligation on his part to see to it that the advertisements of the firm, which showed his connection, should be discontinued. His ignorance, from inattention or from whatever cause, that the publication was continued, could not exonerate him. His position called for affirmative action, the giving of unequivocal notice of his retirement, which implies the duty of withdrawing all contradictory advertisements which were known, or, from the circumstances, must be presumed to have been known to him. As applied to the evidence, therefore, there was no error committed in reference to these instructions.

The tenth instruction given was this:

“The law requires that upon one member retiring from a partnership he must give notice of his retirement, and in giving notice of his retirement he must act in good faith. Now, if you find that Joseph Uhl, when he retired from the People's Bank, before that agreed that he would keep his retirement a secret, and he did keep it a secret, then he did not act in good faith in his retirement; but, by his agreement to keep his retirement secret, he consented that he should continue to be represented as a member while that agreement continued.”

It is true, as counsel contend, that it is not an absolute requirement of the law that notice be given, but only in case the one retiring was known as a partner, and in favor of an old dealer, or a new dealer who knew that he had been a member, but these are points sufficiently explained by other instructions which were given, and, in view of the evidence, this instruction was entirely proper. If, as there was some

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evidence tending to show, the appellant, before retiring, agreed to keep the fact secret, and did afterwards keep it secret or withhold notice of the fact from the public, it was a wrongful act, which should make him liable to any one thereby misled into dealings with the firm, in the belief that he was a member.

The eleventh instruction is as follows :

“If you find that Joseph Uhl retired in 1874, that he told some parties before the plaintiff commenced dealing with the firm that he had retired, and you also find that to others he represented himself as being a member, that is a fact which you may consider in determining whether or not he acted in good faith in giving notice of his retirement. I also say to you that it is a matter of fact for you to determine whether or not Mr. Uhl acted in good faith, and whether or not the notice he gave, if you find that he gave any notice at all, is sufficient.”

Counsel insist that it was not an issue in the case, nor material to be considered, whether the appellant acted in good faith, and that therefore it was not proper to give this instruction. It was, however, a question in the case whether the appellant was a partner when the certificates were issued. He had been a partner, and unless he had retired was yet; but if he retired in bad faith, endeavoring to leave the concern the credit of his name, and yet to escape liability, then his bad faith defeated his purpose, and left him liable in fact as well as in appearance. It is true that the appellee needed not, under the issues, to prove so strong a case in order to prevail, but, nevertheless, he had a right to make the attempt and to have it submitted in that view to the jury.

Among the causes assigned for a new trial is the alleged error of the court in permitting the introduction of testimony that “it was currently reported in Logansport that Uhl was a member of the firm of People’s Bank up to the fall of 1875.” The only point made against its introduction, however, is that it was not admissible for the purpose of showing either the existence of the partnership, or the appellant’s con-

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nection therewith. In this position counsel are unquestionably right. *Earl v. Hurd*, 5 Blackf. 248; *Oregler v. Durham*, 9 Ind. 375; *Macy v. Combs*, 15 Ind. 469; *Brown v. Crandall*, 11 Conn. 92; *Halliday v. McDougall*, 20 Wend. 81. But aside from the instructions of the court, which limited the application of this testimony to the subject of notice of the partnership and of the appellant's retirement therefrom, to which it was clearly relevant and competent, the jury found, in answer to an interrogatory, that the appellant was not a partner after April, 1874, and so it is clear that the evidence did not harm the appellant in that respect.

The advertisement already referred to, and which was shown to have been published in the *Daily Star* while the appellant was a partner and after his retirement, was of the tenor following:

"People's Bank Stockholders: Josephus Atkinson, Joseph Uhl, William H. Whiteside, George Strecker, William H. Standley, E. R. Thompson, Delaware, Ohio. Do a general banking business. Organized under the laws of the State, making every stockholder individually responsible for all liabilities." And in reference to this the appellant requested the following instruction, and others involving the same idea, which were refused:

"No. 15. The plaintiff has introduced in evidence an advertisement in the Logansport *Daily Star*. The legal construction of those advertisements is for the court and not for the jury. Those advertisements do not give public notice of the existence of a partnership known as 'People's Bank.' But the legal effect of them would be to advise the public that there was a corporation organized, pursuant to law, in which Uhl is a stockholder. The plaintiff had no right to rely upon such notices to give credit to Uhl as a member of a firm known as 'People's Bank,' and if you find from the evidence that the only notice the plaintiff had, when he commenced dealing with the bank, was by those advertisements, and that Uhl had at that time retired from the firm, the court charges

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you that the plaintiff had no right to rely upon the same as a public notice of his being a member of the firm."

"We insist," says counsel, "that the evidence was incompetent. The plaintiff did not show that Uhl ever authorized the publication or that he ever had any notice of it; therefore it was not competent. 2d. It did not tend to prove a partnership, or that Uhl was a partner. Both of these objections were pointed out."

As we have already said in substance, there was evidence not only to warrant, but such as required the conclusion, that the appellant was responsible for the advertisement from the time its publication began until it was suppressed upon his order, and even for its continued influence thereafter, because of his failure to give such notice as was calculated to remove the false impression made by the continued publication of the notice.

The objection that it did not tend to show a partnership, but a corporate organization, is still less tenable. There may be shares of stock and stockholders in a partnership as well as in a corporate body. Such in fact was the organization of the People's Bank. Lindley's very elaborate work is designed mainly to explain the law of partnership as applicable to stock companies not incorporated. Besides, the notice under consideration declared every stockholder individually responsible for all liabilities, which is true of a partnership, but not true of an incorporated bank, the shareholders in which, under the law of this State, are liable only "to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." 1 R. S. 1876, p. 165, sec. 13.

It is further claimed that the court erred in refusing to submit to the jury, to be answered in case they found a general verdict, the following interrogatories:

"2. Did the defendant Joseph Uhl make either of the instruments in writing sued on?"

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"3. Did the defendant Joseph Uhl authorize any one to make for him either of the instruments in writing sued on?"

"10. If the plaintiff had any other notice or knowledge that Joseph Uhl was a member of the firm of the 'People's Bank,' except the notice set out in question No. 9, state what it was.

"12. Did not the fact of Uhl's retirement become a matter of public notoriety in business circles in the city of Logansport, where the firm did business during the years 1875, 1876 and 1877?"

"18. Did not the plaintiff believe at and during the time he was dealing with the firm, that it was a corporation or association, and not a partnership?"

The Code, sec. 336, authorizes that the jury be required "to find specially upon particular questions of fact;" but the first and second of these interrogatories call for a finding upon the entire and principal issue in the case, that is, whether the appellant executed the writings sued on. Such questions are sufficiently answered by the general verdict, and are not the proper subject of special interrogatories.

Questions 12 and 18 are in substance the same as Nos. 7 and 17, which were answered, and we do not perceive that it was material or could in any way have affected the result, had the tenth interrogatory been submitted and answered by any pertinent response.

In answer to the questions which were submitted, the jury found, in substance, that the appellant retired and ceased to be a partner from and after April, 1874, but that his retirement was not a matter of public notoriety in the neighborhood where the firm did business at or before February 26th, 1877; that appellee had no dealings with the firm before February 23d, 1876, the date of the first certificate in suit; that the appellant had done and permitted acts to be done with his knowledge, which led the appellee to believe that the appellant "was a member of said firm at the date of any of the instruments sued on," and that at said time the appellee had other notice or knowledge besides said advertisement, that the

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appellant had been a partner, and during the time of his dealing with the firm, the appellee, through no carelessness of his own, acted without notice that the appellant had withdrawn, and believed that he was dealing with partners individually liable, and not with a corporate body. In view of these facts, it is clear that the general verdict in favor of the appellee is in accordance with the merits of the case, as shown at the trial, and that the adverse rulings of the court, so far as they appear to be at all questionable, produced no prejudicial result.

The judgment is therefore affirmed, with costs.

ON PETITION FOR A REHEARING.

WOODS, J.—It is strenuously insisted that the second paragraph of the reply was not a good reply to all the paragraphs of answer to which it was addressed, and that, for the error of the court in overruling the demurrer to it, the judgment ought to be reversed.

The following extract from the appellant's original brief presents the question :

"The complaint is in eight paragraphs, each based upon a certificate for moneys deposited at different times, the last deposited in 1877. The first and second paragraphs are for money deposited in 1876. All the other deposits were made subsequently. The defendant, in his answer, says that he had retired before any of these deposits were made, and the plaintiff, before making the several deposits, had notice of his retirement. It is no reply to this answer to say that when plaintiff made the first deposit, sued upon in the first and second paragraphs of complaint, Uhl held himself out as a partner, and he had no notice of Uhl's retirement. If he had notice when he made the third, fourth, fifth, sixth, seventh and eighth deposits that Uhl had retired, Uhl would be entitled to recover upon those paragraphs."

The answers referred to were nothing but special argumentative denials, and there was no more propriety in replying to

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them than to an answer of general denial. But, waiving this view, and allowing that a replication was admissible, and conceding, too, the soundness of the objection made to the paragraph in question, we still reach the same conclusion. The error in the ruling upon the demurrer was harmless. The answers of the jury to the interrogatories show affirmatively that, during the entire time of his dealings with the firm, the appellee, without notice of his withdrawal, acted in the belief that the appellant, whom he had before known to be a partner, was still a member of the firm.

If, therefore, the reply was too narrow, it is nevertheless clear that the verdict does not rest upon it, but upon proof abundantly sufficient and which was admissible independently of the bad paragraph; and, this being so, the error is not available. *The Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261; *Trammel v. Chipman*, 74 Ind. 474.

Rehearing denied, with costs.

No. 9897.

SCHMIDT v. THE STATE.

CRIMINAL LAW.—*Sale of Meat of Diseased Animals.—Statute Construed.*—

To constitute an offence, under sec. 2070, R. S. 1881, in the sale of meat of diseased animals, or having the same with intent to sell, it was intended that the sale, or intended sale, must be for food, and that the defendant must have knowledge of the bad quality of the meat. ELLIOTT, C. J., and WOODS, J., dissent.

SAME.—*Pleading.—Indictment.*—Where, by construction, a meaning is put upon a statute defining an offence, which is not so broad as the general words of the statute, it is not sufficient to charge the offence in the words of the statute, but the indictment must bring the case also within the meaning of the statute. ELLIOTT, C. J., and WOODS, J., dissent.

From the Marion Criminal Court.

E. A. Parker and W. Patterson, for appellant.

78	41
137	77
78	41
157	197
78	41
161	688
78	41
167	418
78	41
170	127
78	41
171	8

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D. P. Baldwin, Attorney General, *W. W. Thornton* and *J. B. Elam*, Prosecuting Attorney, for the State.

WORDEN, J.—The appellant was prosecuted in the court below on affidavit and information for a misdemeanor. Trial, conviction and judgment.

The sufficiency of the affidavit and information was called in question by motions to quash and in arrest, which were overruled.

The affidavit was as follows :

"Be it remembered, that on this day, before me, Daniel M. Ransdell, clerk of the criminal court of Marion county, Indiana, personally came William D. Griffin, who being duly sworn, upon his oath says, that Charles Schmidt, on the 12th day of November, A. D. 1881, at and in the county of Marion, and State of Indiana, did then and there unlawfully have in his possession, with the intent then and there to sell the same, the meat of certain sick, diseased and injured animals, to wit: the meat of certain hogs, contrary," etc.

The affidavit was duly subscribed by the affiant, and the jurat of the clerk was properly added. The information followed the terms of the affidavit.

The prosecution was based on the following section of the statute :

"Whoever kills, for the purpose of sale, any sick, diseased, or injured animal ; or who sells, or has in his possession with intent to sell, the meat of any such sick or diseased or injured animal,—shall be fined not more than five hundred dollars nor less than fifty dollars, to which may be added imprisonment in the county jail not more than six months." R. S. 1881, sec. 2070.

The first question that seems to present itself is, what was the intent and meaning of the Legislature in the enactment of the above provision ?

The section is evidently not to be taken in its exact literal sense.

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It is found under the article entitled "Against Public Health."

The evident object of the provision was to prevent the killing of such animals for the purpose of sale for food, or selling, or having in possession with intent to sell, *for food*, the meat of such animals.

The Legislature evidently did not intend to prevent the killing of such animals with intent to sell, or the selling of the meat, for such purposes as would not affect public or individual health; and the killing for sale, or the sale of the meat for other harmless purposes, for which it might have a commercial value, was not intended to be interdicted. The statute is to be construed as if the interdict had been put upon the killing for the purpose of sale for food, and the selling, or having in possession the meat with intent to sell it for such purpose.

Another point arises in the construction of the statute.

Was it the intention of the Legislature to make the acts therein specified an offence, without any knowledge on the part of the accused of the character or bad quality of the animals or meat? We think not.

Without such knowledge there could be no intent to do wrong. "Where such intent is wanting," says Mr. Bishop, "he commits no offence in law, though he does acts completely within all the words of a statute which prohibits the acts, being silent concerning the intent." 1 Bishop Crim. Law, sec. 345.

The doctrine is illustrated by the case of *Commonwealth v. Boynton*, 12 Cush. 499, which was a prosecution for selling unwholesome veal, where the court said: "The precedents of indictments for offences similar to that intended to be set out in the present indictment, are quite numerous, and are uniform in alleging, not only that the act of sale was made knowingly, but also in averring that the defendant well knew, at the time of the sale, the corrupt and unwholesome condition of the arti-

cles sold." We shall advert to this case again in the course of this opinion.

Numerous authorities might be cited to the point that guilty knowledge is an essential element of the offence, though it does not enter into the statutory description of it, but we deem it unnecessary. We are clear that by the statute in question it was not intended to punish acts done in ignorance of the character or deleterious quality of the animals or meat.

Before a conviction can be had under the law, then, it must appear that the animals were killed for the purpose of sale for food, or the meat sold or had in possession with intent to sell for such purpose, and that the accused had knowledge of the bad qualities of the animals or meat.

Having ascertained what seems to us to be the true intent and meaning of the law, it remains to enquire whether the affidavit and information, charging the offence in the language of the statute merely, are sufficient.

We are of opinion that they are insufficient. We are aware, of course, that in the great majority of cases it is sufficient to charge a statutory offence in the language of the statute creating it; but this is a rule that is by no means universal. The affidavit and information neither charges the purpose for which the meat was intended to be sold, nor any knowledge on the part of the defendant of its qualities.

The construction we place upon the statute is narrower than the general words. By construction, we limit the operation of the general words to cases where the accused had knowledge of the quality of the article, and where the sale made, or intended, was for food. In such cases it is not sufficient to charge the offence in the language of the statute. In connection with this point, we take pleasure in endorsing what the counsel for the State have said of an American writer upon criminal law. In their brief, the counsel say: "The greatest American writer upon criminal jurisprudence, a man who is not a mere compiler of authorities, thrown together in such a way as to bewilder himself and confuse every body else, but

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one who uses authorities to illustrate great principles of justice, advises the pleader generally to follow the statute, and use no other words if the statute gives any sort of definition of the offence. Bishop Statutory Crimes, sec. 386."

The author above alluded to lays down the rule applicable to such cases as that before us, as follows: "Suppose, again, the statute is in general terms, yet by construction it has a specific application, narrower than the general words; in such a case, the indictment must correspond as well with the judicial interpretation as with the letter of the enactment." 1 Bishop Crim. Procedure, sec. 628.

The language of the statute here is general, but it was intended to include those only who had knowledge; hence knowledge must be averred. So the language is general in respect to the purpose of sales, or intended sales, but the intention was to prohibit sales for food; hence a sale, or intended sale, for food should be averred.

We do not care to extend this opinion by noticing in detail the cases referred to by Mr. Bishop in support of the doctrine. We may, however, refer to one or two of them. In the case of *The Mary Ann*, 8 Wheat. 380, 389, Mr. Chief Justice MARSHALL stated the rule of pleading, as follows:

"It is, in general, true, that it is sufficient for a libel to charge the offence in the very words which direct the forfeiture; but this proposition is not, we think, universally true. If the words which describe the subject of the law are general, embracing a whole class of individuals, but must necessarily be so construed as to embrace only a subdivision of that class, we think the charge in the libel ought to conform to the true sense and meaning of those words as used by the legislature."

The case of *Commonwealth v. Boynton*, *supra*, was a prosecution for knowingly selling unwholesome provisions, viz., a leg of veal, based on a statute which made it unlawful to knowingly sell, etc. The indictment followed the terms of

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the statute in the description of the offence, but this was held to be insufficient.

It was held necessary to aver that the defendant had knowledge of the condition of the meat at the time it was sold; that the allegation that the defendant "knowingly sold," etc., was insufficient. This decision is commented upon by Mr. Bishop, and evidently receives his decided approbation, as founded upon correct legal principles. 2 Bishop Crim. Procedure, sec. 868.

A reputable writer upon the criminal law of Indiana, states the rule thus: "When the statute is not to be taken in the broad meaning of the words used, but to be limited by construction to a special subject or matter, the indictment should not simply charge the crime in the language of the statute, but should limit the case, and bring it within the construction placed upon the statute." Moore's Crim. Law, sec. 171.

A case in point, which we do not find cited by either of the authors above mentioned, is that of *Anderson v. The State*, 7 Ohio, 607. There Anderson was indicted for aiding and abetting one Stevens in passing forged paper.

The statute did not in terms make knowledge of the false character of the paper on the part of the aider or abettor, an element of the offence; and the indictment, following the language of the statute, did not charge such knowledge. It was held, however, that such knowledge was necessary to constitute the offence, and that it must be charged in the indictment. *United States v. Carll*, 16 Reporter, 673.

There are numerous cases, in this State and elsewhere, in which it has been held sufficient to charge an offence in the language of the statute creating it, and this is undoubtedly correct where the statute contains an accurate description of the offence. But there are other cases in which that mode of pleading has been held sufficient, where there were implied exceptions to the statutes, as in some of the cases on the subject of the sale of intoxicating liquors. But those cases are

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not entirely parallel with that before us, and should not be allowed to control it.

The accused has a right to have all the essential elements that enter into the offence charged in the indictment or information, so that he may know what he has to meet, whether those elements are expressed in terms in the statute, or enter into the offence by construction.

Nothing is gained to the State by departing from the well established principles of law in this respect; nor is there any good reason for adopting a loose and uncertain mode of pleading in criminal cases.

This also is the legislative view of the question. By sec. 1755, R. S. 1881, it is provided that "the indictment or information is sufficient, if it can be understood therefrom— * * *Fifth.* That the offence charged is stated with such a degree of certainty that the Court may pronounce judgment, upon a conviction, according to the right of the case."

Upon conviction in this case, what was made certain? The answer is, that the defendant unlawfully had in his possession the meat of certain diseased hogs, with intent to sell the same. The other elements that enter into the offence are left to uncertainty.

The word "unlawfully" does not help the matter, for the defendant may have had the possession unlawfully in a variety of ways without knowing the quality of the meat, or the intent to sell it for food.

Can the court pronounce judgment according to the right of the case, when a part only of the facts constituting the offence are charged, or found true by the verdict? This question, in our judgment, admits only of a negative answer.

Again, sec. 1759 provides that "The defendant may move to quash the indictment or information when it appears upon the face thereof, either— * * *Fourth.* That the indictment or information does not state the offence with sufficient certainty."

The information should have been quashed.

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The judgment below is reversed, and the cause remanded for further proceedings in accordance with this opinion.

DISSENTING OPINION.

WOODS, J.—I am constrained to dissent from the conclusion reached by the majority of the court, both as to the definition of the offence, and the manner of charging it. I consider the decision a radical departure from the doctrine often reiterated and heretofore seemingly well settled in this State, that the charging of an offence in the language of the statute which creates it will ordinarily be deemed sufficient. All crimes are statutory in this State, and the importance of the rule is manifest. As early as 1832, in the case of *Peltis v. The State*, 3 Blackf. 28, the rule was distinctly recognized. It was said:

“CHITTY, speaking of indictments upon statutes” (1 Chitt. C. L. 232), “remarks, ‘and not even the fullest description of the offence, were it even in the terms of a legal definition, would be sufficient without keeping close to the expressions of the statute.’ In page 237, he further remarks, that ‘it is in every case advisable to attend, with the greatest nicety, to the words contained in the act, for no others can be so proper to describe the crime; the exceptions if any are doubtful; and the broad principle which renders a strict adherence essential, is supported by too strong a number of decisions to be shaken.’”

In the case of *The State v. Watson*, 5 Blackf. 155, it is said: “Where an indictment is brought upon a statute which has general prohibitory words in it, it is sufficient to charge the offence generally in the words of the statute.”

In *Malone v. The State*, 14 Ind. 219, it is said: “The indictment is in the language, substantially, of the statute; and as, under our law, we are to look to the statute alone for the definition of offences, it follows that, as a general rule, it will be sufficient in an indictment or information, to charge them in the language of the statute. * * There are some exceptions to this rule; but it seems that an information for usury is not one of them; for an indictment for usury, in the

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language of the statute, was held good under former codes, where common law rules governed.

"As an approximation to a test on this subject, perhaps it may be said that, where the statute defines the offence generally, and designates the particular acts constituting it, as, for example, the case of larceny, it is sufficient, in charging the crime, to follow substantially the language of the statute; but where the statute defines the crime generally, without naming the particular acts constituting it, as if a statute makes it a crime to encourage a slave to run away from his master, without defining the act which should be deemed to constitute encouragement, it might be necessary to set out the acts done, that it might appear to the court that they constituted the offence."

In *The State v. Kalb*, 14 Ind. 403, it is said: "The statute prohibits the sale of liquor to a minor. * * We think the offence consists in selling to a minor, not believing, or having reason to believe him to be an adult. *Prima facie*, the seller would be presumed to know, under the law, whether the person he sold to was a minor or an adult; and, in a case of doubt, he would, if he sold, take the hazard."

The laws, which from the earliest period in the history of the State have been enacted concerning intoxicating liquors, have defined many offences; as, for instance, sales without license, sales on Sunday, or on other days named, or after certain hours in the day, sales to minors, or to persons in the habit of getting intoxicated; and notwithstanding the court has uniformly and consistently held that there were implied exceptions to the statutory definitions, which were to be construed as narrower than the general words, yet it has been held, with equal uniformity and consistency, that it was sufficient to charge the offence in the language of the statute, and that it was for the defendant to show, or raise a reasonable doubt on the point, that the sale was within the implied exceptions, and not punishable.

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If there is any respect in which these cases are not parallel, in principle, with the one under consideration, it has not been pointed out, and I am unable to perceive it. The difference, as it seems to me, is only in the subject-matter of the respective offences. The one law declares the sale of intoxicating liquor unlawful, and the other declares the sale of diseased meat unlawful.

The act which constitutes the offence is defined in each case in general, but in clear and unmistakable words; but, by judicial construction, exceptions are interpolated into each definition.

If there is any reason for saying that under one law the accused must show that the particular sale under investigation was within the exceptions, and under the other law the prosecutor must show that the sale was not within the exceptions, I am not able to perceive it.

Looking outside of the law, and to considerations of public policy, it may be a question whether there are not stronger reasons for imposing on the vender of spoiled meats the burden of showing that the particular sale for which he has been indicted, was made innocently, than for imposing that burden on the seller of intoxicating liquors. There is certainly no reason, either in law or public policy, for imposing upon the former a rule less strict than that which is daily enforced against the latter.

But it is not alone in cases arising under the various laws concerning intoxicating liquors, that this court has held that it is enough to charge the offence in the language of the law which creates it, and that it is incumbent upon the accused to show in defence that the particular act for which he is indicted, though within the letter of the law, is not within its spirit and meaning.

Under an indictment charging, substantially, in the language of the statute, that a supervisor had wilfully and unlawfully failed and neglected to keep a road in repair, it has been held to be matter of defence, not necessary to be negatived in the indictment, that the road was kept in as good repair as the available labor or other means enabled the super-

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visor to do. *State v. Brown*, 8 Blackf. 69; *State v. Harsh*, 6 Blackf. 346; *Tate v. State*, 5 Blackf. 73.

So as to gaming, permitting gaming in a licensed grocery, and keeping a gaming house, *State v. Bougher*, 3 Blackf. 307; *State v. Dole*, 3 Blackf. 294; *State v. Maxwell*, 5 Blackf. 230; *State v. Miller*, 5 Blackf. 502; receiving stolen goods, *Pelts v. State*, *supra*; disinterment of corpse, *State v. McClure*, 4 Blackf. 328; kidnapping, *State v. McRoberts*, 4 Blackf. 178; the failure of a justice of the peace to pay over money, *State v. Noel*, 5 Blackf. 548; selling spirituous liquors in Vincennes, *State v. Graeter*, 6 Blackf. 105 and note; see, also, *State v. Mullinix*, 6 Blackf. 554; *State v. Watson*, 5 Blackf. 155; fornication—it not being stated in the indictment whether the female was married or unmarried—*State v. Gooch*, 7 Blackf. 468; provoking an assault, *Stuckmyer v. State*, 29 Ind. 20; selling foreign merchandise without license, *Colson v. State*, 7 Blackf. 590; usury, *Malone v. State*, *supra*; carrying off growing crops, *Johnson v. State*, 68 Ind. 43; *State v. Allisbach*, 69 Ind. 50; assault with intent to murder, *Shinn v. State*, 68 Ind. 423. These cases furnish strong illustrations of the rule that it is matter of defence, which the accused must bring forward, that his case is an exception to the general words of the statute.

The only authority cited in Moore's Crim. Law to support the proposition quoted therefrom is the case of *Bates v. The State*, 31 Ind. 72; and that case, besides being manifestly out of line with the current of decision in this State, is greatly weakened by force of the vigorous dissenting opinion of one of the judges who then composed the court.

It is, of course, true, and it needed no statute to declare it, that the offence charged must be "stated with such a degree of certainty that the court may pronounce judgment, upon a conviction, according to the right of the case." But the point in dispute is, what constitutes such a charge? The cases cited, and many others which might be added, hold it sufficient to use the language of the statute. A verdict or plea of guilty to a charge so made means that the case of the defend-

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ant does not come within any of the exceptions to the statutory definition, and, upon conviction, the court may, therefore, well adjudge him guilty as charged.

In Bishop on Statutory Crimes, section 358, it is said: "If a statute forbids the sale of milk which is adulterated, or of intoxicating liquor unless the seller has a license, and the words of the statute are general and unqualified, it is plain and sound doctrine that the indictment need not allege, and the prosecuting power need not prove on the trial, the seller's knowledge of the adulteration in the one case, or the intoxicating quality in the other. The analogies connected with the law of the intent sufficiently establish this doctrine. Thus, according to constant practice, the indictment does not allege that the defendant was, when he committed the criminal act, of sound mind, or was more than seven years old, or was not a married woman acting in the presence and by command of her husband; neither is it customary to produce against the defendant, in the first instance, proof of these things. If they are to appear in the case, they are to be set up by the defendant in his defence."

From this point the author considers the course of decisions on the subject in Massachusetts, and adds: "Now, the true doctrine, as a practitioner might expect it to be held by an intelligent court sitting out of Massachusetts, is this: Mere proof by the defendant, that he did not know of the intoxicating quality of the liquor or of the adulteration of the milk, would not necessarily be adequate in defence; for, if on all the facts, as they should appear from the evidence produced on the one side and on the other, the jury should be satisfied the defendant was lacking in good faith, or did not care, or was wilfully blind, or was negligent in his examinations and inquiries on the question of adulteration or the intoxicating quality, he would be responsible, though in a certain sense he was mistaken. And the reason is, that carelessness or negligence, for example, is criminal, as well as the more specific intent to violate the law. But further the general doctrine

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does not go. According, therefore, to the general doctrine, as elsewhere held, and according to sound reason, a prohibition of a thing, in mere unlimited words, no more implies a legislative intention to overturn the principle of the common law that a defendant must be judged by the facts as he honestly believes them to be, than to overturn the principle that, to be responsible, he must be of sound mind."

This, I think, a key to the true interpretation of the statute under consideration, as well as an accurate statement of the rule of pleading and proof in such cases; and there is, as I conceive, no necessary conflict between these quotations and what is said by the same author in section 628, 1 Bishop Crim. Procedure, quoted in the principal opinion. That section is limited by its language, to statutes, which, though general in their terms, are restricted, by judicial construction, to "a specific application;" as, for instance, in the case of *The Mary Ann*, 8 Wheaton, 380, where general words were used, embracing a whole class of individuals, but were so construed as to embrace only a subdivision of the class, it was held that "the libel ought to conform to the true sense and meaning." But the statute under consideration is general, both in its terms and in its application. There may be specific exceptions from its general application, to be judicially declared from time to time, but nevertheless the law is a general one, and not one of "a specific application."

The same author, summing up in relation to what is a sufficient charge of the offence under such statutes, says:

"Any one who reads our American decisions in detail, and observes the diverse adjudications made upon the sufficiency of indictments drawn on new and unexpounded statutes, will observe two things: First, that some judges are more ready than others to accept of indictments which merely follow the words of the statute; secondly, that the tendency in modern times is to require an expansion beyond the words in fewer circumstances than formerly would have been demanded. But what partly accounts for both of these facts is, that, in some of

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our States, statutes have expressly permitted wide departures from the common-law rules; while, in other of the States, the departures permissible are less in extent, and less numerous." 1 Bishop Crim. Procedure, section 630.

ELLIOTT, C. J.—I concur in the opinion of WOODS, J.

No. 8532.

WESTON ET UX. v. WILEY.

MORTGAGE.—*Note Given in Lieu of Notes Secured by Mortgage.*—*Evidence.*—*Payment.*—In an action upon a note, and to foreclose a mortgage given to secure the notes for which the note in suit had been executed, evidence that the plaintiff's assignor received the note in full payment of the mortgage notes is admissible, and if the mortgage notes were fully paid by the new note there could be no foreclosure of the mortgage.

PAYMENT.—*Promissory Note.*—*Presumption.*—*Evidence.*—Anything is payment which the creditor accepts as payment, and one note is paid by another note, if the latter is accepted as payment; if the note given in payment be negotiable by the law merchant, the presumption is that it was received as payment, and, if not thus negotiable, the presumption is that it was not received as a payment, but evidence is admissible to show that in fact it was received as a payment.

From the Franklin Circuit Court.

W. H. Bracken, T. H. Smith, J. F. McKee and D. W. McKee, for appellants.

W. H. Jones and J. R. McMahan, for appellee.

BICKNELL, C. C.—The appellee brought this suit against the appellants upon a note and mortgage. The complaint alleges that Kutzendaffer mortgaged the land to Williams and Day, to secure notes given by him to them for the purchase-money of the land; that Kutzendaffer sold the land to the appellant Talbot E. Weston, subject to the mortgage, and afterward Williams and Day assigned the notes and mortgage to William Print, and Weston assumed the payment of the notes to Print, and "took up the notes, so secured by said

mortgage, and executed a new note payable to Print for \$238.70," which was the balance due on the original notes; a copy of the mortgage and a copy of the new note are annexed to the complaint and made part thereof. The complaint further states that Print endorsed said new note to the plaintiff; that the same is due and wholly unpaid, and contains a proviso for a reasonable attorney's fee, and that such a fee is \$25. The complaint asks judgment for the amount of the note and attorney's fee, and for foreclosure of the mortgage.

The mortgage is dated February 20th, 1869, and it describes the notes secured by it as follows: Four notes, of even date herewith, one for \$67.50, due January 1st, 1869; one for \$100, due one year after date; one for \$100, due two years after date, and one for \$100, due three years after date, all with interest at ten per cent., and payable without relief. It does not appear that these notes made any provision for attorney's fees, and the mortgage contained no such provision. The new note was dated December 6th, 1874, and was payable one day after date. None of the notes were negotiable under the law merchant.

A demurrer to this complaint was overruled. The defendant Talbot E. Weston answered in two paragraphs.

1st. The general denial.

2d. As to the foreclosure claimed in the complaint, he answers that the notes secured by the mortgage were fully paid before suit brought, by this defendant giving his own note therefor, and that thereby the mortgage was satisfied.

The defendant Margaret Weston answered the complaint separately by a general denial. The plaintiff replied in denial of the second paragraph of Talbot Weston's answer, and the issues were tried by the court without a jury. There was a finding for the plaintiff for the amount of the new note and interest, and for \$20 as an attorney's fee, and that the new note was given for the remainder of the purchase-money

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of the mortgaged land, and was secured by the mortgage, and that the plaintiff was entitled to foreclosure.

The defendant's motion for a new trial was overruled, and judgment was rendered upon the finding. There was no motion to correct or modify the judgment. The defendants appealed. They assign as errors:

1st. Overruling the demurrer to the complaint.

2d. The finding that the note and mortgage named in the complaint were a lien upon the land therein described.

3d. Overruling the motion for a new trial.

4th. Rendering judgment declaring the amount found due on the note sued on to be a lien on said real estate, and in ordering the same to be sold.

The first of these alleged errors is not alluded to in the appellants' brief, and is therefore regarded as waived.

The principal question arises upon the overruling of the motion for a new trial. Among the reasons presented in support of this motion are errors of the court in excluding the testimony of the defendant Talbot E. Weston, and that the finding is not sustained by the evidence, and is contrary to law. One of the issues in the case was whether the notes mentioned in the mortgage had been paid. The bill of exceptions shows that the plaintiff, having introduced his evidence, and having rested, the defendants' counsel offered the defendant Talbot E. Weston as a witness, and proposed to prove by him that the note in suit was received by Print, the plaintiff's assignor, in full payment of the mortgage notes; the court refused to permit this proof to be made. This was error. If the mortgage notes were fully paid, there could be no foreclosure of the mortgage. Formerly nothing but money was a payment, but since the case of *Louden v. Birt*, 4 Ind. 566, anything is payment which the creditor accepts as payment. *Tilford v. Roberts*, 8 Ind. 254. One note is paid by another note, if the latter is accepted as payment; if the note given in payment be negotiable, according to the law merchant, the presumption is that it was received as a payment. *Alford v.*

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Baker, 53 Ind. 279. If it be not so negotiable, then the presumption is, it was not received as a payment, but in such case evidence may be introduced to show that, in fact, it was received as a payment. *Alford v. Baker*, *supra*. The defendant ought to have been permitted to testify that the note in suit was actually received as a payment of the mortgage notes held by Print, and for this error the motion for a new trial ought to have been sustained. The court below erred in overruling the motion for a new trial, and its judgment ought to be reversed. This result renders it unnecessary to consider the other errors. It may be observed, however, that although the finding allows the plaintiff twenty dollars as an attorney's fee, there was no evidence whatever before the court showing what would be a reasonable attorney's fee. No witness testified upon that subject. The cause should be remanded for a new trial.

PER CURIAM.—It is therefore ordered by the court, upon the foregoing opinion, that the judgment of the court below be and it is hereby in all things reversed, at the costs of the appellee, and this cause is remanded for a new trial.

78	57
129	226
129	233
129	236
78	57
153	39

8427.

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SHERIFF'S SALE.—*Execution.—Levy.—Judgment.—Lien.—Deed.—Notice.*—A joint judgment was rendered against H. and others, upon which an execution was issued and levied upon lands of one of the other defendants, which was subject to the prior lien of an older judgment, but of value much exceeding both judgments. This land was sold to satisfy the senior judgment, and the sheriff having returned that fact upon the execution on the junior judgment, and an *alias* issuing, he levied it upon the lands of H., which he sold upon it to the plaintiff, who, in due time, obtained a sheriff's deed.

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Held, that the levy of the first execution was, until legally disposed of, a satisfaction of the judgment.

Held, also, that the mere sale to satisfy the older lien did not, in view of the right to redeem therefrom, given by statute, divest the junior lien, and was not such a disposition of the property as warranted the levy on the lands of H.

Held, also, that the purchaser, being the plaintiff, was charged with notice of the irregularity, and took nothing by his purchase and deed.

From the Greene Circuit Court.

E. E. Rose and *E. Short*, for appellant.

W. I. Baker and *L. Shaw*, for appellee.

NEWCOMB, C.—The appellee was the plaintiff below. His complaint was in two paragraphs. The first was in the ordinary form for the recovery of real estate and damages for its detention. The second was to avoid and set aside a sheriff's sale of the same real estate, had on an execution to which the appellee and others were defendants. The appellant answered the complaint by a general denial, and filed a counter-claim asserting title in himself, and praying that his title might be quieted. Issue on the counter-claim by a denial. The cause was tried by the court, and, at the request of the defendant, a special finding of facts and conclusions of law was made. The findings both of fact and law were for the plaintiff below, and the defendant excepted to the conclusions of law.

The facts found were, that the appellant recovered a judgment in the Greene Circuit Court, against Peter Hagaman, Nancy Hagaman, and the appellee, James E. Hagaman, on October 25th, 1876, for \$411.10 and costs. That the appellee and said Nancy were sureties for Peter Hagaman in the debt for which said judgment was recovered, but no issue or finding of suretyship was made in said judgment. That on the 27th day of April, 1877, an execution was issued on said judgment to the sheriff of Greene county, and on April 30th, 1877, said sheriff levied said execution on a tract of land in Greene county belonging to said Peter Hagaman, of the value of \$3,500. That said land was then incumbered by a prior

Neff v. Hagaman.

judgment in favor of Richard J. McKinney *et al.*, and against Michael C. Cade, John Hagaman, William J. Beem and said Peter Hagaman, which was rendered on the 14th day of June, 1876, in said Greene Circuit Court. That on the 27th day of December, 1876, an execution was issued on this judgment to said sheriff, and levied April 30th, 1877, on the same land of Peter Hagaman upon which appellant's execution was levied; and on June 27th, 1877, said land remaining unsold, the sheriff returned said McKinney execution; and on July 5th, 1877, an *alias* execution was issued on said McKinney judgment, reciting the former writ, levy and failure to sell. On this *alias* execution said sheriff advertised and sold said lands on August 18th, 1877, to said McKinney, for the sum of \$342.65, which sum was applied on an execution in favor of one Darling Fuller, and against said Peter Hagaman, which was issued upon a judgment rendered prior to said judgment in favor of McKinney *et al.* Said sheriff issued to said McKinney a certificate of purchase, and on August 17th, 1878, said land was redeemed from said sale.

That said execution issued on appellant's judgment remained in the hands of said sheriff until October 24th, 1877, when it was returned, and that the lands of Peter Hagaman so levied upon were never advertised or sold on said execution of said appellant; and said sheriff, without making any disposition of said levy on said lands of Peter Hagaman, except reciting the fact that they had been sold on said execution issued on said McKinney judgment, proceeded on the 2d day of October, 1877, to levy said execution so issued on appellant's judgment on the lands of the appellee, described in his complaint; and, on October 25th, 1877, an *alias* execution was issued on said judgment of appellant, reciting therein only the last levy aforesaid on the lands of the appellee, and omitting therefrom the first levy on said lands of Peter Hagaman; that said sheriff, by virtue of said *alias* execution, advertised, and on December 22d, 1877, sold, said lands of appellee to the appellant for \$100; and, at the expiration of

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one year thereafter, said lands, not having been redeemed, said sheriff executed to appellant a deed therefor; and that appellant claims title to and possession of said lands by virtue of said sheriff's deed; that said lands of appellee so sold to appellant were worth \$2,500, and that the lands of Peter Hagaman, first levied upon, were worth \$3,500, and that all the incumbrances against the latter did not exceed \$1,500. No personal property was found to satisfy either of said executions.

From these facts the court found the following conclusions of law:

1. That the levy of the execution of Alexander Neff on the land of Peter Hagaman, on April 30th, 1877, operated as a satisfaction thereof so long as said levy remained undisposed of by sale, or in some other legal manner;

2. That the sale of said Peter Hagaman's land on the McKinney execution did not divest the lien of the defendant's judgment and execution thereon, nor divest nor dispose of defendant's levy on said land, but that the same still remained subject to sale on said defendant's execution, and it was the duty of the sheriff, before levying on other property, to first sell the lands of Peter Hagaman so first levied upon;

3. That the levy of the defendant's execution on the land of the plaintiff, and the sale to the defendant thereunder, on December 22d, 1877, were null and void, by reason of the failure to first dispose of the prior levy on the land of said Peter Hagaman;

4. That the plaintiff was entitled to the possession of the lands in controversy, and to damages in the sum of \$209.

Judgment was rendered for the appellee, pursuant to said findings.

The error assigned is, that the court erred in its conclusions of law.

The law has been settled for nearly sixty years in this State, that a levy upon lands or goods of sufficient value to pay the judgment upon which the execution issued raises the

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presumption that the judgment is satisfied, and another levy and sale can not be made until the first levy has been legally disposed of. *Lasselle v. Moore*, 1 Blackf. 226 ; *McIntosh v. Chew*, 1 Blackf. 289 ; *Miller v. Ashton*, 7 Blackf. 29 ; *Barret v. Thompson*, 5 Ind. 457 ; *Doe v. Dutton*, 2 Ind. 309 ; *Law v. Smith*, 4 Ind. 56 ; *Lindley v. Kelley*, 42 Ind. 294 ; *McCabe v. Goodwine*, 65 Ind. 288.

The appellant concedes that this is the general rule, but urges that it is not applicable to the case at bar, for two reasons :

1. That the sheriff, having the appellant's execution in his hands when he sold the Peter Hagaman land on the McKinney execution, virtually sold on both executions, and therefore the levy of appellant's execution on said land was exhausted by such sale ;

2. That the sheriff, after the sale on the McKinney execution, and by the return of such fact as a reason for not selling said property on appellant's execution, abandoned said levy ; and that the same was rightfully abandoned, because no title was left in Peter Hagaman that could be the subject of sale.

In support of his first proposition, the appellant quotes the following portion of sec. 196 of Freeman on Executions :

"If a sheriff have two or more writs in his hands, it is his duty to apply the proceeds to the writ having the elder lien. He may, however, levy and sell under the junior writ. If he does so, the purchaser acquires title to the property sold, free from the lien of all the other writs. In such an event, the plaintiff, under whose junior writ the levy and sale were made, is not entitled to the proceeds of the sale. On the contrary, it is the duty of the sheriff to apply these proceeds to the several writs that may be in his hands, according to their priority as liens. A sale, when made by the officer, is not for the benefit of the particular writ under which it is made, but for the benefit of all writs in his hands, according to their respective priorities."

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The above observations of Mr. Freeman are applied by him to cases where the execution creates the lien, and not to liens created by the judgment. In the same section he says: "There are some very important differences between the operation of a lien by execution and that of a lien by judgment or mortgage. A judgment or mortgage lien can not be displaced by a sale made under any junior lien. The purchaser, at the sale under the junior lien, acquires a title which may be divested by a subsequent sale under an elder lien."

The case of *Harrison v. Stipp*, 8 Blackf. 455, is also cited in support of the appellant's theory. It was held in that case, that when a sheriff has several executions in his hands (the laws as to a sale under them being different), and the real estate levied upon is divisible, he should commence with the execution first to be satisfied, and sell enough of the property, under the law governing such sale, to satisfy that execution; and that he should afterward sell under the other executions in their order, according to the same rule, until all are satisfied or the property is exhausted. But, if the property is not susceptible of division, the same should be sold under the execution first to be satisfied.

As the law was prior to the redemption statute of 1861, a sale of land under a senior judgment extinguished the lien of a junior judgment, and necessarily vacated the levy of an execution issued on such junior judgment, for the reason that such sale, consummated by a conveyance, divested the title of the judgment debtor, and there was no estate left to which the lien of the junior judgment could attach. But for the statute providing for the redemption of real estate from an execution sale, the sheriff's return would have shown that the lien of appellant's judgment on the land of Peter Hagaman was destroyed by the sale on the older judgment of McKinney, and the subsequent levy on the land of the appellee would have been legal. Under the redemption statute, however, a different rule prevails. The title of the judgment debtor continues until the year for redemption has expired;

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consequently the liens of junior judgments continue as though no sale had taken place, during the time allowed for redemption, and, of course, have full vitality after a redemption. *Davis v. Langsdale*, 41 Ind. 399; *Hasselman v. Lowe*, 70 Ind. 414; *Greene v. Doane*, 57 Ind. 186; *Bodine v. Moore*, 18 N. Y. 347. And in case of a redemption the lien relates back to the date of the judgment. *The State, ex rel. Allen, v. Sherill*, 34 Ind. 57. The case of *Davis v. Langsdale* presented substantially the same question as the present. Gay and Langsdale held notes secured by the same mortgage, but Gay's was the senior lien. He brought his action to foreclose and made Langsdale a defendant. The latter set up his claim, and in the foreclosure proceedings a judgment was rendered in his favor, as well as in favor of Gay; but it was provided that Gay's lien should be first satisfied out of the proceeds of the sale of the mortgaged premises. The whole was sold, but realized enough only to pay Gay's judgment.

It was held, that, notwithstanding Langsdale was a party to the judgment and decree of sale, the lien of his judgment was not divested by the sale to pay Gay's judgment, and that he was entitled to redeem. It follows from the principle established in that case, that the lien of the appellant's judgment on the land of Peter Hagaman was not extinguished by the sale on the McKinney execution.

The second proposition of the appellant is as untenable as the first. The sheriff had no authority, of his own volition, to abandon the levy upon the lands of Peter Hagaman. This follows from the decisions of this court, above cited, that a sufficient levy is *prima facie* a satisfaction. It was said, in *McCabe v. Goodwine*, *supra*, that, where property has been released from a levy by consent of the parties to the execution, the plaintiff can not abandon such levy to the injury of third persons. The rights of the appellee could not be affected by the act of the sheriff in assuming to abandon the levy on the property of Peter Hagaman. The alleged aban-

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donment was unauthorized by law. Freeman on Executions, sec. 271.

The appellant, having purchased at his own execution sale, is chargeable with notice of the irregularity in the proceedings of the sheriff.

The circuit court did not err in its conclusions of law, and its judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be, and it is hereby, in all things affirmed, at the costs of the appellant.

78	64
198	473
78	64
142	69

No. 7148.

HAZZARD v. VICKERY ET AL.

EVIDENCE.—*Experts.—Comparison of Handwriting.*—Evidence to prove the signature to papers, with a view to comparison by experts with the signature in dispute, is not admissible. The comparison by experts is confined to papers in the case which the party is estopped to deny, and such others as he admits to be genuine.

SAME.—*Witness.—Deposition.*—Where a witness, testifying by deposition, states that he has seen the note sued on, and has a copy of it, which he produces and makes a part of his deposition, his name appearing as attesting witness, he sufficiently identifies the note in suit, that he may say whether or not the alleged maker executed it, to his knowledge.

From the Henry Circuit Court.

J. H. Mellett, E. H. Bundy and M. E. Forkner, for appellant.

T. B. Redding, for appellees.

FRANKLIN, C.—Appellant sued appellees on a promissory note.

Vickery filed, among other paragraphs of answer, *non est factum*, and want of consideration.

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There are no errors assigned in this court as to Webster, and his pleading need not be noticed.

Trial by jury; verdict in favor of appellant against Webster, and in favor of Vickery against appellant. Motion by appellant for a new trial overruled, exception reserved, and judgment rendered on the verdict.

The errors assigned here are, the overruling of the motion for a new trial, and the overruling of a demurrer to the 4th paragraph of Vickery's answer.

The second error assigned is not mentioned or referred to by the counsel on either side in their briefs, and is therefore considered as waived. And the same may be said of the first reason for new trial, which was, that the verdict was not supported by the evidence and was contrary to the law.

The second reason assigned for a new trial is irregularity in the proceedings of the court. In which are included the following specifications:

"1st. The court erred in refusing to allow the plaintiff to prove by the defendant David L. Vickery, that the exhibits 'A,' 'B,' and 'C,' and the plea of *non est factum* referred to in said witness's evidence on said trial, were the same papers present at the taking of the depositions of David L. Vickery, Justinian H. Hull and others, on the 22d day of February, 1878, at the office of Dye & Harris, in the city of Indianapolis, and that they were examined by the witnesses whose testimony was taken, and are the identical papers referred to in their depositions; and cross-examined the witnesses and gave his own testimony acknowledging them to be genuine.

"2d. The court erred in refusing to allow the plaintiff to prove by the defendant Vickery that he signed his name to his said deposition on file in said cause.

"3d. The court erred in ruling out and refusing to allow the plaintiff to read in evidence in said cause the depositions of David L. Vickery, James L. Slaughter, Justinian H. Hull, and John G. Kennedy.

"4th. The court erred in permitting the defendants to read
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in evidence the deposition of Calvin R. Scott over the objection of the plaintiff.

"5th. The court erred in refusing to allow the plaintiff to prove that the character of Edmund A. Webster was bad two years before the trial."

The question arising upon the first and second specifications is the same, and they may be considered together, and that is, what papers can be used by experts in comparison with the disputed signature?

It is the settled practice in this State that some papers can be used for that purpose, and the rule has been adopted, that they are such as properly belong in the case, and which the party is therefore estopped from denying, and those that are admitted to be genuine. But that no collateral issue will be permitted to be raised, by attempting to prove the genuineness of any paper for the purpose of using for comparison alone. 1 Greenl. Evidence, sec. 581; *Chance v. The Indianapolis, etc., G. R. Co.*, 32 Ind. 472; *Burdick v. Hunt*, 43 Ind. 381, p. 387; *Huston v. Schindler*, 46 Ind. 38, p. 43; *Forgey v. The First National Bank, etc.*, 66 Ind. 123.

Under this rule, before papers other than those legitimately in the case can be used by experts in comparison with a disputed signature in the case, they must be admitted to be genuine, and over an objection they can not be proven to be genuine by the testimony of the party objecting or any other person. While the authorities are conflicting upon this question, and some of the courts of other States, where the doctrine of proof by comparison prevails, have extended the rule so as to hear proof of the genuineness of the other papers offered for comparison by experts, this court thinks it best to still adhere to the limitation established by its former decisions. And under that the court below did not err in refusing to require the defendant under oath to answer as to the genuineness of the papers used by the experts in comparison with the disputed signature, as set forth in their depositions. The papers used by the experts for such comparison in their depositions,

Hazzard v. Vickery *et al.*

not being admitted as genuine, and a part of them being papers not belonging to the suit, the court committed no error in excluding the depositions, as complained of in the third specification.

The fourth alleged irregularity was admitting in evidence, on the part of appellee, the deposition of Calvin R. Scott.

His name appears as the attesting witness to the note in suit. The note was for \$700. He testified that he knew Hazzard, and was slightly acquainted with Vickery, but did not know Webster. That in the November before, he had examined the note in suit, a copy of which is made a part of his deposition, marked "Exhibit A." It was exhibited to him by George Hazzard (the plaintiff) in Chicago, Illinois. He did not remember of ever having seen it before; did not remember of ever having signed that note; he did not attest a note at David L. Vickery's residence for \$125, in March, 1876; never signed any other note in the presence of Vickery; could not say whether he did or not at his request; had examined his signature to the note in suit, and could say it looked very much like his signature, but was not prepared to say whether it was or not. He signed a note, it was his impression, in May, 1876, for Hazzard, as attesting witness, but did not sign it with the impression that it was a Vickery note; never saw David L. Vickery sign his name to but one note, and that was the \$125 note referred to above, and never saw Edmund A. Webster sign his name to any note. He generally wrote his signature without taking the pen off of the paper, and noticed the general appearance of the signature looked like his. He never attested any note for George Hazzard for \$700, or any other amount, to which the name of David L. Vickery was signed. If he signed the note, he was at the Citizens' State Bank of New Castle, Indiana, in the presence of George Hazzard, at his request or suggestion, and did not at the time understand that it was a note on David L. Vickery; does not recollect that David L. Vickery ever said anything to him about any note to George Hazzard.

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The above is substantially the answers in the deposition, omitting the questions.

The objections to this deposition are, that the testimony was irrelevant and immaterial, and that the witness testified from a copy of the note instead of the original.

The deposition does not show whether the original note was present when the deposition was taken. But the witness did not testify from a copy. The original was exhibited to him by appellant, some three months previous; he examined it and his signature thereto, and made a copy of it a part of his deposition.

We think it sufficiently identified the note, and that the evidence contained in the deposition was not irrelevant and immaterial; that these objections were not well taken, and that the court did not err in admitting the deposition in evidence.

The fifth and last specification was in relation to proving the bad character of Webster two years before the trial.

Counsel have not named or referred to this question in their briefs, and it may be considered as waived.

We see no available error in this record, and the judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and the same is, in all things, affirmed, at appellant's costs.

No. 8019.

GRAY ET AL. v. THE STATE, EX REL. MILLS.

ESTOPPEL.—*Guardian and Ward.—Bond.—Sureties.*—The sureties upon a guardian's bond, executed by them and their principal to obtain an order to sell real estate of his wards, after he has sold the real estate and received the money, are estopped to deny that their principal had in fact been appointed guardian of such wards.

Gray *et al.* v. The State, *ex rel.* Mills.

From the Hamilton Circuit Court.

T. J. Kane, T. P. Davis, W. Garver, R. Graham, A. F. Shirts, G. Shirts and W. R. Fertig, for appellants.

R. R. Stephenson, for appellee.

BEST, C.—The facts out of which this controversy arises are briefly these: At the January term, 1870, of the common pleas court of Hamilton county, Indiana, the appellant Elisha Mills, as guardian of Frank A. Mills, the relator, and Clara M. Mills, his sister, filed his application to sell their real estate, caused it to be appraised, and, upon the order of the court, executed his bond, with his co-appellants as his sureties, and upon its approval obtained an order to sell such real estate, which he subsequently did for the sum of \$2,340. After the relator attained full age, he brought this suit upon the bond to recover such portion of one-half of such sum as remained unexpended. Issues were formed, and upon the trial the appellants Gray and Baker offered to prove that Elisha Mills, the principal in said bond, was not in fact the guardian of Frank A. and Clara M. Mills, when the bond was executed. This the court excluded, on the ground that they were estopped by the execution of the bond to prove such fact. This question was properly saved, and is the only one discussed by appellants in their brief.

The bond is as follows:

“Know all men by these presents, that we, Elisha Mills, Joseph R. Gray and Nehemiah H. Baker, are bound unto the State of Indiana, in the penal sum of four thousand dollars (\$4,000), to pay which we jointly and severally bind ourselves, our heirs, executors and administrators. Sealed and dated this 28th day of January, 1870.

“The condition of the above obligation is, that as the above bound Elisha Mills, guardian of Frank A. Mills and Clara M. Mills, minor heirs of Martha A. Wren, deceased, has been ordered by the court of common pleas of Hamilton county to sell certain real estate of the said wards. Now, if the said

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Elisha Mills will faithfully discharge the duties of his trust according to law, then the above obligation is to be void, else to remain in full force in law.

ELISHA MILLS, [SEAL.]

"J. R. GRAY, [SEAL.]

"N. H. BAKER. [SEAL.]"

This bond was executed in conformity with the provisions of our statutes, was authorized by them, and is conceded to be a valid and binding obligation unless the appellants can show that Elisha Mills was not in fact the guardian of the relator. Can they do this? We think not. After having joined him in the bond, recited the relation he sustained to the relator, enabled him to procure the order, sell the land and obtain the money, nothing but a meritorious defence should exonerate them from the obligations of their bond. All the facts necessary to create an estoppel are present. The bond was executed, the recital made, the order procured and the money of the relator obtained, and to allow the appellants to avoid its payment by a denial of their own recital would result in such manifest injustice that no court, it seems to us, ought to hesitate in applying the doctrine of estoppel in exclusion of such defence. The appellants, however, say that the entire proceeding was a nullity; that the relator's title to the land was not divested by such pretended sale, and that the money realized therefrom was not the money of the relator, but of the "would-be purchaser."

In support of this position, the case of *Coon v. Cook*, 6 Ind. 268, is cited. The case does not support them. In that case a pretended guardian obtained an order to sell the real estate of a person of unsound mind, made the sale, obtained the money, and afterward the assignee of the purchaser brought an action against the guardian of such person subsequently appointed to enforce the specific performance of such contract, obtained a decree, and, on appeal, this court held such contract a nullity. Upon the facts stated, as between the parties to that suit, the decision was unquestionably right; and if this was an action by the purchaser to obtain a conveyance, or

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by the relator to recover or quiet his title to the land, the case cited would be decisive of the rights of the parties. This is not, however, such a case. The relator, by the institution of this suit, does not question either the regularity or the legality of such sale, but, on the contrary, if such objections exist, waives them all and affirms the sale. This he may do, and, although he can not convey the title by election or estoppel, yet he can affirm the sale, take the purchase-money, and thus preclude himself from claiming the land. The acceptance of the purchase-money, arising from an invalid sale, affirms the sale and estops the party from questioning its validity. This rule applies as well to void sales made by guardians as by others. *Deford v. Mercer*, 24 Iowa, 118.

If, then, the principal on the bond was not, in fact, the guardian of the relator, and this fact renders the sale void as between the relator and the purchaser, the acceptance of the purchase-money will estop the relator from questioning the sale, and as to him it will be treated as valid. The relator, having the right to affirm the sale, and having brought this suit in affirmance of it, we think, as between the parties to this record on the question of estoppel, the sale must be treated as valid, and the money arising therefrom as belonging to him.

Again, to assume that the relator's title to the land was not divested by such sale, and the money arising therefrom did not belong to him, in order to avoid the estoppel, is assuming the truth of just such facts as the estoppel precludes the appellants from proving. The estoppel can not be avoided in this way. If it could, it would follow that a party could thus reap the benefit of such facts as the estoppel is invoked to exclude.

Nor can it be avoided by the fact that the relator may reclaim his land. If so, it only proves that he has another remedy. This, however, may not be so adequate, and to compel him to resort to it not only deprives him of an election between inconsistent remedies, but may result in actual loss

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to him. In this case, the land may have been sold for its full value; the interest may largely exceed the rents and profits; the land may have depreciated in value; the rents and profits may be beyond recovery, and the land itself may be in the possession of those who will not surrender it without a contest. These considerations, and others that will readily suggest themselves, show that a denial of the facts recited in the bond will deprive the relator of substantial rights under it, which he can not otherwise assert or enforce, and to deprive him of them is a sufficient reason for excluding the defence.

The appellants also insist that the bond is invalid, and for that reason they are not estopped.

If so, we agree with them, as an invalid instrument does not work an estoppel. Such as have been taken in violation of law, or have been procured by fraud or duress, for instance. This bond was not so procured, nor was it taken in violation of law. The law authorized its execution, and as there is nothing about the bond indicating its invalidity, we know of no reason why it should not be treated as valid in determining whether or not its makers should be estopped to dispute its recitals. If the recitals are true, the bond is valid, and we think that, for the purpose of determining whether its recitals can be disputed, it must be regarded as valid. To regard it otherwise, is to successfully contradict its recitals before it has been decided that it can be done. This is not the law; otherwise every recital in every instrument could be disputed with impunity.

Indeed, the very reasons urged against its validity furnish the strongest argument in favor of the estoppel. If the appellants are allowed to dispute their recital, the relator will lose his money and the purchaser his land. On the other hand, if the proof is excluded, justice will be done to all and injury to none. The relator will be secured, the purchaser protected, and the bond enforced, precisely as it would be were the facts as recited. To avoid similar results, the doctrine of estoppel was adopted, and to avoid these, we think, it should be applied.

Upon principle it seems to us, the appellants ought to be estopped, but they insist it has been held otherwise in the case of *Thomas v. Burrus*, 23 Miss. 550.

In this case a guardian had been appointed, and while such appointment remained unrevoked the court appointed another, and in a suit upon the bond of the latter it was held that the appointment of the first exhausted the power of the court, and for that reason the appointment of the latter was void. In support of this conclusion the cases of *Griffith v. Frazier*, 8 Cranch, 9; *Bledsoe v. Britt*, 6 Yerg. 458, and *Lewis' Ex'rs v. Brooks*, 6 Yerg. 167, were cited. They fully support the conclusion, in which we concur, but an examination of them shows that no question of estoppel arose in either of them. In each, a right was asserted through such appointment.

In *Griffith v. Frazier*, an administrator was appointed while another who had been formerly appointed was administering, and in a suit for the recovery of land the defendant claimed title through such appointment, and it was held that such appointment was void.

The case of *Bledsoe v. Britt* was an action of assumpsit by the latter as guardian, and it was held, as the wards had a guardian when the plaintiff was appointed, her appointment was void.

In *Lewis' Ex'rs v. Brooks*, John, Robert and Arthur Brooks had been appointed administrators, and as such had recovered a judgment against the executors of Lewis for \$3,000. Arthur Brooks died, and John F. Stump was appointed administrator *de bonis non*. Afterward, Stump compromised with the executors of Lewis, and John and Robert Brooks disregarding such compromise, the question arose as to its validity. This depended upon the legality of his appointment, and it was held, that as an administration is an entire thing, and as John and Robert Brooks were the administrators of such estate when Stump was appointed, his appointment was void.

The question of the legality of these several appointments was involved in these cases, and was correctly decided, but it

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does not, therefore, follow that if these suits had been upon the bonds of the several persons whose appointments were held void, the same thing would have been decided, or that the question would have arisen.

The case of *Thomas v. Burrus*, *supra*, not only decided that such appointment was void, but held that the surety was not estopped from showing it. The court said the doctrine of estoppel "presupposes a valid or legal obligation, and we do not know any authority, and reason certainly is against the position, that a party is estopped by any recital contained in an instrument from showing, that the instrument containing it is absolutely null and void," and concluded by saying that, if the court had no power to accept the bond, its acceptance fixed no liability upon the surety. It is clear that the cases cited do not support the court's conclusion, and, so far as we know, no case does. If the instrument is invalid, of course it can not work an estoppel, but its invalidity can not be shown by disputing its recitals. It must otherwise appear. It did not otherwise appear in such case, and therefore we do not feel like following it.

On the other hand, several authorities support the conclusion we have reached.

In *Cutler v. Dickinson*, 8 Pick. 386, where there was no evidence of the administrator's appointment except such as appeared from the bond, it was held that the obligors were estopped to deny his appointment.

The case of *Shroyer v. Richmond*, 16 Ohio State, 455, was a suit upon a guardian's bond. The sureties insisted that the guardian's appointment was illegal. The court held that they were estopped, and said: "By executing this bond, they obtained for their principal the possession and control of his ward's property, and can not now be permitted to escape liability to account therefor, by denying the recitals of their own bond. They are estopped to do so."

The case of *Fridge v. The State*, 3 Gill & Johnson, 103, was a suit upon a guardian's bond, in which the surety urged

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the invalidity of the principal's appointment as a defence, and it was held that he was estopped. The court say: "Owen Dorsey having given his bond, in which he is stated to be the guardian of E. A. K., and having obtained possession of her property, it would not, in a suit against him, have lain in his mouth to deny that he was guardian, in the very face of the recital in his bond, or to set up any supposed irregularity in obtaining the appointment; the recital in the bond being evidence as against him, that he was guardian. Nor does it lie in the mouth of his surety, against whom the recital is equally evidence."

Norton v. Miller, 25 Arkansas, 108, was a suit upon a guardian's bond, and the invalidity of the appointment was urged as a defence. The court held that although the appointment was irregular, it having been made in the wrong county, the principal and his sureties were estopped by the recitals in the bond to raise the objection.

The case of *Iredell v. Barbee*, 9 Ired. 250, was a suit upon the bond of the guardian of an insane person. The law did not authorize the appointment unless it had been found by a jury that such person was a lunatic or an idiot, and, as it was not so found, it was insisted that the bond was void. The court said: "It is true, the court had not power to appoint King the guardian of Mrs. Fann and authorize him to take her estate into his possession, but the defendant will not be heard to make this objection; he concurred in the act; his bond solemnly asserts that. * * And after King has taken the estate into possession and wasted it, it is not for him to say, that it was unlawful, and, therefore, that he is not bound by his undertaking deliberately entered into."

These cases, we think, decisive of the question under discussion. It is true that in some of them appointments had been irregularly made, but this fact does not impair the force of such cases as authority upon the question. The obligors in such cases were estopped, not because of an irregular appointment, but because the bond recited the fact that an

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appointment had been made. In the case first above cited there was no proof of an appointment, and in the case last above cited the court was not authorized to appoint, yet it was held that the makers of such bonds were estopped to deny the fact of appointment. These cases are very analogous.

Again: In *Collins v. Mitchell*, 5 Florida, 364, it was held that the sureties upon a sheriff's bond were estopped to deny that their principal was sheriff when the bond was made, though he was dead, the principal's name having been signed by another. If dead, of course he was not sheriff; still the sureties were bound. And we think the appellants are bound, though their principal had not in fact been appointed the guardian of the relator.

The appellants also refer us to the following cases in support of their position, viz.: *Pryor v. Downey*, 50 Cal. 388; *Perry v. Brainard*, 11 Ohio, 442; *Higginbotham v. Thomas*, 9 Kan. 328.

We have examined them and find that no question of estoppel was involved in either of them. Each was an action of ejectment. In the first, title was claimed through an administrator's sale; in the others, through guardian sales. In the first, it was held that the sale was void because the pretended administrator had not been appointed; in the last, because such guardian had not been appointed; and in the other, because the sale was made after the ward arrived at full age. In none of them did the persons making the sales have any authority to make them, and therefore no title could be derived through them. This is in accordance with what was decided in *Coon v. Cook*, *supra*, and is in entire harmony with the conclusion we have reached.

Upon principle and upon authority, the ruling of the court below was right, and the judgment should therefore be affirmed.

PER CURIAM.—It is therefore ordered that upon the fore-

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going opinion the judgment be, and it is hereby, in all things affirmed.

Opinion filed at May term, 1881.

Petition for a rehearing overruled at November term, 1881.

No. 8170.

ROBERTSON v. THE TERRE HAUTE AND INDIANAPOLIS
RAILROAD COMPANY.

NEGLIGENCE.—Railroad.—Negligence of Co-employee.—Brakeman.—Train Dispatcher.—Injury to a brakeman upon a train *en route*, by reason of a collision with another train moving in an opposite direction, and which was the result of the negligence of the train dispatcher, whose duty it is to control the movement of trains, affords no right of action against the railroad company for the injury. The brakeman and train dispatcher, though many miles apart, and with distinct duties, are nevertheless co-servants in the accomplishment of the same general object.

From the Vigo Circuit Court.

S. B. Gookins, G. C. Duy and W. H. H. Russell, for appellant.

J. G. Williams, for appellee.

MORRIS, C.—The appellant brought this suit to recover damages for an injury alleged to have been received by him while in the service of the appellee as a brakeman on one of its trains. To the appellant's complaint the appellee filed a general denial. The cause was submitted to a jury for trial. The appellant having introduced his evidence in support of his complaint, the appellee demurred to it. The appellant joined in demurrer. The court sustained the demurrer, and judgment was rendered for the appellee.

The appellant assigns as error the sustaining of the demurrer.

The testimony shows that on the morning of the 28th of

78	77
130	320
78	77
134	467
78	77
140	652
78	77
151	307
151	308
151	309
151	310
78	77
159	87

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March, 1876, the appellant was in the employ of the appellee as head brakeman on its train No. 14, and that said train left Indianapolis for Terre Haute on that morning at one o'clock and forty minutes. That the regular time of said train for leaving Indianapolis was one o'clock and ten minutes A. M., but that in accordance with the rules, and regulations of the appellee, it waited at Indianapolis a half hour for train No. 19, which was due from Terre Haute. That at or near Bridgeport, some nine miles west of Indianapolis, No. 14 collided with No. 19. That without fault on his part, and in consequence of such collision, the appellant's leg was caught between the coal car and tender, and crushed and broken so that it had to be amputated. The testimony also shows that there was a side-track on the appellee's road at Bridgeport that would hold sixty cars; that there was a switch at the west end of said side-track, and that the collision took place a short distance east of the side-track. Train No. 19, running eastward from Terre Haute to Indianapolis, passed the side-track at Bridgeport, intending to run upon the side-track through the switch at its east end. That it could have run upon the side-track through the switch at the west end, and that, had it done so, the injury might not have happened to the appellant.

The testimony further showed that the appellee's train dispatcher lived at Terre Haute; that no notice was given to train No. 19 of the time at which train No. 14 left Indianapolis; that train No. 19 was not running on time, being about one hour behind time at Bridgeport, and that it was running in violation of the rules of the appellee. That No. 14, on which the appellant was brakeman, was running on time and in accordance with the rules and regulations of the appellee, and that the collision occurred without fault on the part of appellant or those having charge of train No. 14. The evidence also showed that the appellee had telegraph offices and operators at Indianapolis, Greencastle and Terre Haute. By Rule 6 of the appellee's regulations, eastward-bound freight trains are entitled to the track, but, if a half hour be-

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hind time, then westward-bound trains become entitled to the track as against the belated train.

It may be fairly inferred, we think, that those operating train No. 19, as well as those in charge of train No. 14, were acquainted with the rules of the appellee as to the running of its trains; that those in charge of No. 19 knew that it was more than a half hour behind time; that they also knew that No. 14 would not, for that reason, leave Indianapolis until a half an hour after its usual time; they further knew that it was the duty of those in charge of No. 19 to leave the track free for No. 14. No. 19 should, therefore, have run upon the side-track through the switch at its west end, and thus left the track free for No. 14. The neglect to do this probably caused the accident and the injury to the appellant.

The appellant insists, however, that the reasonable inference from the evidence is, that the collision of the trains was due to the negligence of the appellee's train dispatcher; that, had he notified the conductor of train No. 19, of the time of the departure of train No. 14 from Indianapolis, and directed him to enter upon the side-track at Bridgeport from the west, the accident would not have occurred.

But, conceding that the evidence tends fairly to show that the appellant's injury was due to the negligence of the appellee's train dispatcher, the question arises, Was the appellee's train dispatcher the co-servant of the appellant? If they were fellow servants, the appellant can not recover; if they were not, then he should recover. This is the only question in the case urged by the appellant.

The appellant insists with much confidence and earnestness, that a train dispatcher is not the co-servant of a brakeman, because in the performance of his duties he is stationary, while the brakeman is out upon the train.

The duties of the train dispatcher and the brakeman are quite distinct, but not more so than are the duties of the trackman or the switch-tender and the brakeman. Safety in

Vance v. English.

running trains requires the prompt and faithful discharge of the duties of all these employees. Their co-operation and combined labor relate to the same object, and are essential to the movement of trains upon the road. The mere fact that the duties of some of the employees are performed upon the train, and those of others at a particular place upon the road, does not, as claimed by the appellant, determine the question of their common employment. If the duties discharged by each relate to the same general object, they must be held to be fellow servants. It is enough if they are employed for the purpose of effecting the same general object. *Wharton Neg.*, sec. 230; *Slattery's Adm'r v. The Toledo, etc., R. W. Co.*, 23 Ind. 81; *Wilson v. The Madison, etc., R. R. Co.*, 18 Ind. 226; *Gormley v. The Ohio, etc., R. W. Co.*, 72 Ind. 31. The court did not err in sustaining the demurrer. *Durgin v. Munson*, 9 Allen, 396.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

78	80
129	569

No. 8657.

VANCE v. ENGLISH.

PROMISSORY NOTE.—*Principal and Surety.—Collateral Securities.—Answer.*—

To a suit against the maker and two endorsers of negotiable notes, one of the endorsers answered that she endorsed merely as surety of the maker; that she was induced to do so by reason of the fact that the notes were secured by a mortgage on real estate of ample value to make this indebtedness and an older mortgage thereon for a small sum; that a suit was brought to foreclose the older mortgage, to which the plaintiff was made a party; that he suffered a judgment of foreclosure, and that the real estate was sold to satisfy the older lien, and the time for redemption allowed to expire, without her knowledge, the plaintiff giving her no notice thereof.

Held, that the plaintiff had a right to be passive as to the mortgage security, and was under no legal obligation to notify the endorser of said suit, and, therefore, that the answer was bad on demurrer.

Vance v. English.

From the Marion Superior Court.

S. Claypool, H. C. Newcomb and W. A. Ketcham, for appellant.

J. R. Wilson, for appellee.

NIBLACK, J.—Suit by the appellee, William H. English, against Jacob C. Dick, as the maker, and Samuel C. Vance and Mary J. Vance, as the endorsers, before maturity, of two negotiable promissory notes, one for \$1,580, and the other, \$158, and both dated July 24th, 1875, and payable to the appellant, Mary J. Vance, three years after date.

Dick made default, and there was a return of “not found” as to Samuel C. Vance.

Mary J. Vance answered, admitting her endorsement of the notes, but averring that she endorsed the same as the surety of her co-defendant Dick, and not otherwise; “that at the time of her endorsement, the notes were fully secured by a mortgage on a lot in one of the additions to the city of Indianapolis, then worth the sum of \$3,000; that the only other incumbrance on said lot was an older mortgage to one Elijah T. Fletcher, to secure an indebtedness for about the sum of \$400; that she was induced to endorse the notes by reason of their being secured by said mortgage, and would not have endorsed the same if they had not been so secured, as she had no other security for her endorsement; that the plaintiff well knew that she was only liable on the notes as the surety of the said Dick, and that her said endorsement was secured by said mortgage; that after her endorsement of the notes, and while the plaintiff was the owner of the same, the said Elijah T. Fletcher instituted an action in the Superior Court of Marion county against the said Dick and the plaintiff to foreclose his senior mortgage on the mortgaged lot; that the plaintiff, well knowing that she, the said Mary J. Vance, had no other security for her endorsement of the notes than the mortgage executed to secure the same, and residing within a half mile of her residence wholly failed and neglected to notify her of the com-

Vance v. English.

mencement or pendency of said action by the said Fletcher and suffered judgment therein to be taken against him by default, to the effect that he had no interest in the mortgaged lot; that she never received any notice whatever of the pendency of such suit, and the foreclosure of the Fletcher mortgage as a result of that suit, until after the mortgaged lot had been sold under the foreclosure proceedings, and the time for the redemption of the lot from such sale had expired, all of which was before the maturity of the notes in suit, and by reason of which the security afforded by the mortgage given to secure the notes became and was wholly lost to her; that the said Dick had become wholly insolvent. Wherefore she claimed that she had been discharged from all liability on said notes."

The court below, at special term, sustained a demurrer to this answer, and the defendant Mary J. Vance refusing to answer further, judgment was rendered against her and her co-defendant, Dick, for the full amount of the notes.

The said Mary J. Vance thereupon appealed to the general term, assigning error upon the decision at special term, sustaining the demurrer to her answer, but the judgment at special term was affirmed.

Error is assigned here upon the proceedings at general term.

It is argued on behalf of the appellant, with great earnestness, that the appellee was under a legal obligation to notify her of the institution of the suit against Dick and him, to foreclose the Fletcher mortgage, and that by reason of his failure to so notify her, and of the consequences which resulted to her from such failure, she became discharged from all liability on account of her indorsement of the notes sued upon in this action; that consequently the court below, at special term, erred in sustaining the demurrer to her answer.

A surety has an undoubted right, upon payment of the debt of his principal, to have the full benefit of all the collateral

Vance v. English.

securities which the creditor may hold as an additional pledge for his debt.

It is also the duty of the creditor to use all reasonable care in the preservation of all collateral securities which he may have acquired for the security of his debt, and to which the surety has a right to become subrogated on payment of the debt, but it has never been held that the mere passiveness of the creditor in the collection of his debt, either of the principal debtor, or from collateral securities held by him, is sufficient ground for discharging the surety.

As regards collateral securities, the creditor must be guilty of some wrongful act, such as by a release or fraudulent surrender of such securities in order to discharge the surety.

In treating of the general subject of the duties and liabilities of a creditor, as to collaterals which he may hold for his debt, and in which a surety may be interested, the court, in the case of *Schroeppell v. Shaw*, 3 Comstock 446, after reviewing several decided cases, says: "Thus, it will be seen, that, in reference to collateral securities, the rule is the same as in reference to the collection of the debt of the principal debtor. The creditor is under no obligation of active diligence for the protection of the surety, so long as the surety himself remains inactive. Until the surety moves in the matter, it is enough that the creditor holds himself in readiness to transfer to him, when he applies, all the securities he holds, that he may have the benefit of such securities in aid of his own responsibility." See, also, the following authorities: *Philbrooks v. McEwen*, 29 Ind. 347; *Hayes v. Ward*, 4 Johns. Ch. 123; *Freaner v. Yingling*, 37 Md. 491; *Brandt on Suretyship*, secs. 372, 373 and 374.

Numerous authorities are cited on behalf of the appellant, but none of them are in conflict with the principles enunciated as above.

The appellee was not bound to any active diligence concerning the mortgage given to secure the notes endorsed by the appellant, and it was not averred that he made any release,

Vance v. English.

transfer or other disposition of the mortgage prejudicial to the rights of the appellant. He had the right to maintain an action on the notes against the maker and endorsers without resorting to the mortgage. *Allen v. Woodard*, 125 Mass. 400. It was consequently optional with him as to whether he would avail himself of the security afforded by the mortgage. Being thus not compelled to resort to the mortgage, he was under no obligation to pay off the Fletcher mortgage, or to do any other affirmative act, to preserve the lien reserved by the mortgage.

As has been seen, the appellant averred in her answer, that she was induced to endorse the notes because of the security for their payment which resulted from the mortgage. The inevitable inference from that averment is, that, when she made the endorsement, she had full information as to value of the security which was created by the mortgage, and of the means which might become necessary to protect such security and to make it available in the event that she should become liable upon her endorsement.

If, when she endorsed the notes, she relied upon the mortgage for her indemnity, she was much more interested in maintaining intact the lien of the mortgage than was the appellee, and it devolved upon her to take whatever measures were necessary for the preservation of that lien in case she continued to rely upon it.

It follows, from what we have said, that the appellee was under no legal obligation to notify the appellant of the institution of the suit by Fletcher to foreclose his mortgage, and that the demurrer to the appellant's answer was correctly sustained.

The judgment at general term is affirmed, with costs.

Martens v. Rawdon et al.

No. 7650.

MARTENS v. RAWDON ET AL.

PLEADING.—*Mortgage.—Foreclosure.—Complaint.*—"Duly Recorded."—A complaint to foreclose a mortgage of real estate against the grantee of the mortgagor, which alleges that the mortgage "was duly recorded in the mortgage records of Marion county, Indiana," without stating when it was done, is bad on demurrer.

SAME.—*Memorandum on Copy of Mortgage.*—Such a defect is not aided by a memorandum endorsed upon the copy of the mortgage filed, but not signed by any one, it being no part of the complaint; nor would it be cured by it, if signed.

From the Marion Superior Court.

F. M. Finch and J. A. Finch, for appellant.

C. W. Smith and R. O. Hawkins, for appellees.

WORDEN, J.—Complaint by the appellant against the appellees to foreclose a mortgage, executed on March 30th, 1848, by Christiana Martens, the plaintiff's mother, to secure to the plaintiff, Christiana Martens, the daughter, the payment of a sum of money stated therein.

The complaint contained five paragraphs, the first and fourth of which only remain in the record. The first paragraph alleged that the mortgage "was duly recorded," without stating when or where; and the fourth alleged that it "was duly recorded in the mortgage records of Marion county, Indiana," without stating when it was done.

The defendant Margaret F. Rawdon answered, alleging, in substance, among other things, that, after the execution of the mortgage, the mortgagor, Christiana Martens, intermarried with Henry F. A. Joachimi, and, with her husband, conveyed the real estate mortgaged to one John Toucksess, and that Toucksess and his wife conveyed it to said Henry F. A. Joachimi, and that afterward Joachimi and his said wife sold and conveyed it to John Bussey. The answer traces title to the defendant through mesne conveyances from Bussey, and

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shows that she is a purchaser for a valuable consideration without notice of the plaintiff's mortgage.

The plaintiff demurred to this answer for want of sufficient facts, but the demurrer was overruled. Exception.

The plaintiff declining to reply, judgment was rendered for the defendant. Judgment affirmed on appeal to general term.

The judgment below must be affirmed. The answer of the defendant showed title in herself free from the mortgage, unless the latter was so recorded as to become constructive notice to her. Neither paragraph of the complaint shows when the mortgage was recorded. For aught that appears therein, it may have been recorded only on the day on which the action was commenced.

The complaint should have shown when the mortgage was recorded, in order that it might appear to have been done within the time prescribed by law, or before the right of the defendant, or those under whom she claims, accrued. *Magee v. Sanderson*, 10 Ind. 261; *Faulkner v. Overturf*, 49 Ind. 265. There is, to be sure, a memorandum endorsed upon the copy of the mortgage filed, stating the time of recording, but this is not signed by any one, and if it were it could not aid the defect in the complaint. See the case last above cited; also, *Peru Bridge Company v. Hendricks*, 18 Ind. 11.

The judgment below is affirmed, with costs.

No. 8238.

MORRIS v. BUCKEYE ENGINE COMPANY ET AL.

JUDGMENT.—*Default.*—*Action for Relief under Section 99.*—*Practice.*—*Issues.*—

Proof.—An applicant, under section 99 of the code, for relief from a judgment by default, need not prove his alleged defence to the original action, but he must prove his excuse for suffering the default, and the proof *pro* and *con* may be by affidavit, including the applicant's verified complaint

 Morris v. Buckeye Engine Company et al.

or motion, or by oral testimony, or by both kinds of evidence, in the discretion of the court.

SAME.—Evidence.—Record.—The exclusion of evidence on a particular point, or of a particular kind, presents no question when the record does not show what other evidence was offered.

SAME.—Decedents' Estates.—Personalty belongs to Representative, not to Widow and Heirs.—Action.—Parties.—In an action, under section 99 of the code, to be relieved from a judgment on default, the complaint alleged that after the death of the judgment plaintiff, who had obtained a judgment upon a contract whereby M. and another had agreed to release the judgment plaintiff from a debt owing by him to B., B. procured an order against the widow and heirs, the administrator not being made a party, substituting B. as plaintiff in the judgment, and hence B. is made defendant to the application to set the judgment aside.

Held, that the order substituting B. as plaintiff was a nullity.

Held, also, that the judgment belonged to the administrator, not to the widow, and that B. was consequently not a necessary party to the plaintiff's application, and, the administrator having made default, the plaintiff was entitled as against him to an order setting the default aside.

From Blackford Circuit Court.

W. March, for appellant.

B. G. Shinn and *W. H. Carroll*, for appellees.

WOODS, J.—This case was an application under the 99th section of the Civil Code, to be relieved from a judgment on default, taken against the appellant in favor of James Swoveland, since deceased, and whose administrator, James Sommerville, was made a defendant. The motion or complaint was duly verified, and, besides the ordinary averments necessary to such an application, showed that the judgment from which relief was sought was rendered on a contract purporting to have been made by the appellant and others, whereby they agreed to release Swoveland from a debt of \$1,150, owing by him and others named to the Buckeye Engine Company; and that after the rendition of the judgment said company, on an application to which the appellant was not made a party, had procured an order of the court against the heirs and widow of Swoveland, no others being made parties to the procedure, declaring said company to be substituted as

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plaintiff in the judgment, instead of said widow and heirs; and that for this reason said company was made a defendant to the application.

The record shows a default duly taken against the administrator of Swoveland, a submission of the motion by the plaintiff, Morris, and the defendant, the Buckeye Engine Company, to the court for a hearing and trial, and a finding and judgment for the defendants, the appellees.

It is claimed that the court erred in the following particulars:

First. In overruling the motion for a new trial.

Second. In overruling the motion of the appellant to set aside the default and judgment.

Third. In finding for Sommerville after he had made default.

The causes stated in the motion for a new trial are the following:

1st. The finding is contrary to the law and to the evidence, and is not sustained by sufficient evidence.

2d. The court erred in refusing to permit the plaintiff to testify in his own behalf in relation to his defence to the original action, and in relation to his alleged excuse for not appearing to the action.

3d. The court erred in refusing to permit the plaintiff to read in evidence his written motion in the case, verified by his affidavit, or any portion thereof.

4th. The court erred in overruling the plaintiff's motion to set aside the default against him as to each of the defendants.

It was not necessary that the appellant should make any proof of his alleged defence to the original cause of action. That is a matter which can be tried only in the original action, and for the purposes of this proceeding can not be disputed. Buskirk's Prac. 276-8, and cases cited.

Whether his alleged excuse for permitting the judgment to go by default was true in fact, was a matter to be tried either upon affidavits *pro* and *con*, including the verified complaint

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or motion, which was proper to be considered on the part of the plaintiff, or upon oral proofs, or upon proofs of both classes, in the discretion of the court.

There is a bill of exceptions in the record, showing that the court excluded testimony offered by the appellant, as complained of in the motion for a new trial; but whether the rulings were harmful to the appellant it is impossible to say, for the reason that the record does not show what other proof, or indeed that any other proof, was offered. We can not say that it was shown that the judgment had ever been taken, from which it was sought to be relieved, or, if taken, that the engine company had or claimed any interest therein, real or apparent. It is clear, therefore, that for any or all the reasons assigned we can not reverse the judgment as against said company.

If it be true, as alleged, that the widow and heirs of Swoveland, alone, were made parties to the proceeding by which the engine company was substituted as plaintiff in the judgment, the order for the substitution is a nullity, for the want of the administrator as a party; for he alone was the representative of the estate; and, this being so, the engine company was not a necessary, though a proper, party to the appellant's application to set aside the default.

As to the appellee Sommerville, administrator of Swoveland's estate, his default admitted the truth of the petition, and entitled the appellant to a judgment against him, setting the default aside, and admitting the appellant to defend. Whether such permission can now be of any avail to him depends, of course, on the fact whether the engine company did procure a valid order for its substitution as plaintiff and owner of the judgment from which the appellant seeks relief.

The judgment of the circuit court, in favor of the Buckeye Engine Company, is affirmed, with costs; and the judgment in favor of the appellee James Sommerville, administrator of the estate of James Swoveland, is reversed, with costs and with instructions to proceed in accordance with this opinion.

 Ross v. Thompson.

No. 7292.

ROSS v. THOMPSON.

78	90
194	579
127	167
137	249
78	90
128	122
78	90
181	269
78	90
146	497
78	90
148	104
78	90
154	222
78	90
161	119
162	500
78	90
166	131

EASEMENT.—Grant.—Prescription.—Deed.—Evidence.—An easement is a way attached to an estate, belongs to the estate as part of it, and not to the person of the owner of the estate, and a grant of the estate passes the easement, though not specified in the deed, and even though the latter does not, in terms, convey appurtenances. Therefore, where title to the easement is claimed as having been acquired by prescription, proof that the present owner of the estate has personally enjoyed it for the requisite period of time is unnecessary. It is sufficient that it has been, during that period, attached to the estate of which he is now seized.

SAME.—Highway.—Action for Damages.—A private easement may exist in a way which is also a public highway, and it does exist whenever the lands are so situated, with reference to the highway, that the use of the latter is necessary for access to the land. In such case, the owner of the land can maintain a suit for damages for obstruction of the highway.

SAME.—Instruction.—Private and Public Way.—Obstruction.—In such case, when the fact of obstruction by the defendant is not disputed on the trial, the complaint containing a paragraph for obstructing a private way, and another for obstructing a public way necessary to approach the plaintiff's lands, an instruction to the jury is not available error, which declares that "The question for you to determine is, has the plaintiff the easement by prescription, claimed by him in the first paragraph of his complaint, or the special interest in the highway, claimed in the second paragraph of his complaint? If you find that he has either, your verdict should be in his favor."

INSTRUCTION.—Practice.—There is no error in an instruction to the jury which, announcing no legal proposition, merely states the nature of the plaintiff's claim.

PRIVATE WAY.—Obstruction.—Pleading.—Joinder of Causes.—Verdict.—Judgment.—In a suit for damages, a paragraph of complaint for obstructing a private way of the plaintiff may be joined with one for obstructing a public highway in which the plaintiff has a special interest, and a verdict for the plaintiff is good without specifying whether the way is public or private, and a judgment thereon, "that the way be opened up and kept open," is proper.

SAME.—Prescription.—Instruction.—In such case an instruction, declaring that the plaintiff can not recover unless he has proved a prescriptive right to the way claimed, but a slight variation in any particular would be of no consequence, such as a variation in the course of the way for a few feet at a given point, or in the terminus of the way, is correct.

HIGHWAY.—Prescription.—Dedication.—User for twenty years constitutes a road a public highway, but user for a less period may so constitute it by

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dedication, all that is required being the assent of the owner of the soil to the public use, and the enjoyment of such use for such a period that public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment.

SAME.—Acceptance.—An acceptance by the public of such way is shown by long continued user, grading, macadamizing, bridging, or the like.

SAME.—Estoppel.—Where the owner of land through which a way runs knows that another is offering costly improvements, in the faith that the way is public, and making no objection, he is estopped from asserting that the way is not public.

SAME.—Damages.—Injunction.—One whose only mode of access to his real estate is being interrupted by unlawful obstructions, may arrest the injury by injunction, and he may recover damages merely nominal, not being bound to wait until the injury is fully consummated and actual damages have accrued.

SAME.—Dedication.—Intention.—Presumption.—Intention by the owner of the soil to dedicate a way to public use must appear by proof, but it will be presumed against the owner of the soil, when the easement has been enjoyed by the public during a period corresponding with the limitation of real actions, fixed by statute.

From the Jefferson Circuit Court.

C. E. Walker and W. S. Roberts, for appellant.

C. A. Korbly and A. D. Vanosdol, for appellee.

ELLIOTT, C. J.—This action was instituted by the appellee to recover damages for the disturbance of an easement, and to enjoin the appellant from interfering with its free use.

Easements may be acquired either by grant or by prescription, but in whatever manner acquired they are annexed to the dominant estate. It is the land constituting the dominant estate which possesses the easement; not the owner of the land. The easement is not attached to the person; it is part of the estate and passes with it. The enjoyment by a dominant estate of an easement for a sufficient length of time to create a right by prescription, will annex the easement to that estate, and it will pass by grant. It was not necessary, therefore, for the appellee to show that he had personally enjoyed the easement for twenty years. His case is made out by showing that the dominant estate granted to him had acquired the easement by prescription. Changes

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in ownership did not break or interrupt the continuance of the user by the dominant estate. The complaint shows the appellee to be the owner of the land to which the easement was annexed, and this gives him the right to sue for any encroachment upon the right of way.

The second paragraph of the complaint, it is said, avers that the right of way described is both a public and a private one. We do not so construe the pleading. It shows a special right in a public way. But if it did allege the right of way to be both a public and a private one, still, if it showed a clear infringement of the appellee's legal rights, it would be good upon demurrer. If two causes of action are improperly united in one paragraph, the remedy is by motion, and not by demurrer.

An individual can not maintain an action for the disturbance or obstruction of a public easement, unless he has sustained some special injury. If the only injury is one common to all having a right to use the highway, then no one of those suffering injury can maintain a private action. In such a case there is a common right, and one to be vindicated as are other public rights. There is no distinct private right to be redressed. A special or peculiar injury, different from that suffered by the community at large, will entitle the person injured to maintain an action. The complaint shows that the appellee has sustained special injury. It shows that his premises are occupied by costly buildings erected for manufacturing purposes; that they are surrounded on three sides by steep hills, and that the only means of ingress or egress is that supplied by the highway obstructed by the appellant. Clearly enough the injury to the appellee is different and distinct from that of other members of the community.

The second subdivision of the first instruction given by the court simply states the claim of the appellee. It does not state any proposition of law to the jury. There was no error in stating the nature of the cause of action relied upon as entitling the appellee to a recovery.

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The second instruction is as follows: "The questions for you to determine are, has the plaintiff the easement by prescription, claimed by him in the first paragraph of his complaint, or the special interest in the highway claimed in the second paragraph of his complaint? If you find that he has either, your verdict should be in his favor." There is no valid objection to this instruction. If the appellee had acquired an easement by prescription in a private way, his right of action was complete. If the way was a public one, and a special injury resulted to him from its obstruction, an action would lie. Had there been any dispute as to the fact that obstructions were placed upon the way, then the instruction would have been too narrow; but there was no such dispute. If the appellant is right in his contention, that two such causes of action as those stated in the instruction were improperly joined, the point should have been presented by demurrer. We think, however, that the causes of action were properly joined. One having a right in a way, and being uncertain as to its character, may in separate paragraphs assign to it either a public or a private character, and, if the evidence proves it to be either, he may recover, provided, of course, that other facts essential to his cause of action are established.

In criticising this instruction counsel say that it is erroneous, because it affirms that an individual may have a special interest in a public highway. Cases almost without number, and certainly without opposition, declare that an action may be maintained by a citizen who has sustained special injury; and it would be impossible to conceive special injury where there was no special interest. The special interest gives the cause of action; the extent of the injury measures the compensation. A man who owns a business block, fronting on a public highway which affords the means of getting into or out of his property, has certainly a special interest in the public way. It is quite plain, that, if the highway were closed, his building would be almost, if not altogether, valueless. *Stet-*

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son v. Faxon, 19 Pick. 147; *Knox v. Mayor, etc.*, 55 Barb. 404; *Schulte v. North Pacific, etc., Co.*, 50 Cal. 592; *Sanzay v. Hunger*, 42 Ind. 44.

The instructions do not declare that an individual can have a private way by prescription in a public highway. They do assert that he may have a special right or interest in a public highway upon which his land abuts. This is good law. A man's interest in a public highway which affords means of getting to or from his land is a right which even the Legislature can not take from him without compensation. *Corning v. Lowerre*, 6 Johns. Ch. 439; *The Common Council, etc., v. Croas*, 7 Ind. 9; *Haynes v. Thomas*, 7 Ind. 38; *Butterworth v. Bartlett*, 50 Ind. 537; *The State v. Berdetta*, 73 Ind. 185. While the dedication of the highway is to the public, yet, through the same act of dedication, private rights are conferred which the donor can not retake, nor the Legislature impair. *City of Cincinnati v. White*, 6 Peters, 431; *Morgan v. Railroad Co.*, 96 U. S. 716; *Baker v. Johnston*, 21 Mich. 319; *Mayor, etc., v. Franklin*, 12 Ga. 239; *City of Peoria v. Johnston*, 56 Ill. 45; *Haynes v. Thomas, supra*; *Tate v. The Ohio, etc., R. R. Co.*, 7 Ind. 479; *Protzman v. Indianapolis, etc., R. R. Co.*, 9 Ind. 467; *The Indiana, etc., R. W. Co. v. Boden*, 10 Ind. 96. Some of the cases cited from our own reports have been overruled, in so far as they hold that the law requiring a railway company to cause an assessment of damages to be made and tendered does not apply where the abutter's interest in the street is taken; but this, instead of weakening, really strengthens the doctrine that an abutter may have a special interest in a highway. *Cox v. The Louisville, etc., R. R. Co.*, 48 Ind. 178.

The seventh instruction declares that the appellee can not recover unless he has proved a prescriptive right to the way claimed, but that "a slight variation in any particular would be of no consequence,—such a variation in the course of the way for a few feet at a given point, or in the terminus of the way." The objection to this instruction is thus stated in the

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brief of counsel: "The first paragraph of the complaint does not show what way is claimed, and the second is as to a public way, and we claim that the law requires the way to be clearly defined, and so proven." This objection can not prevail. If the right is proved substantially as laid in the complaint, it is sufficient. A deviation of a few feet for a short distance can not be allowed to defeat the right to recover. It is true that the way must be defined with reasonable certainty, and we think it is so defined in this case.

The eleventh instruction again tells the jury what is charged in the second paragraph of the complaint, and is substantially the same as the first instruction. We think it correctly states the charge of the complaint, and an instruction which does this can not be deemed erroneous.

The twelfth instruction is not very clearly drawn, but we think it correctly expresses the law. One branch of the instruction is, in effect, as follows: If the way was opened by the owners of the land in 1849 or 1850, and it has been since that time used as a public highway by the public, and as such improved by the public authorities, and the owners of the land over which it runs knowingly permitted private rights to be acquired on the faith that it was a public highway, then said road became "a public highway by dedication." There are several distinct principles bound up in this instruction, and these we shall state and dispose of separately.

The user for twenty years was sufficient to give the public an easement, and to constitute the road a public highway. User for a less period of time than twenty years will in many cases be sufficient. The rule is thus stated by Judge Dillon: "No specific length of possession is necessary to constitute a valid dedication; all that is required is the assent of the owner of the soil to the public use, and the actual enjoyment by the public of the use for such a length of time that the public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment." 2 Dillon Munic. Corp., sec. 631. *City of Evansville v. Evans*, 37 Ind.

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229 ; *Holcraft v. King*, 25 Ind. 352 ; *State v. Hill*, 10 Ind. 219 ; *Mauck v. The State*, 66 Ind. 177.

Acceptance by the public is said to be necessary in order to constitute the way a public one. *Mansur v. The State*, 60 Ind. 357. The great weight of authority is that long continued user by the public is sufficient evidence of acceptance. However it may be as to the effect of user, it is well settled that improving the way by grading, macadamizing, bridging or the like, is sufficient evidence of acceptance by the public. 2 Dill. Munic. Corp., sec. 642 ; Angell Highways, sec. 161 ; Washburn Easements, 3d ed., 197.

Another branch of the instruction asserts, substantially, that, where the owner of lands through which the way runs, knows that another is erecting costly buildings and making improvements in the faith that the way is a public one, and such owner, possessing full knowledge of what is being done, offers no objection, he is estopped from asserting that the way is not a public one. The question was exhaustively discussed by the Supreme Court of the United States in *Morgan v. Railroad Co.*, *supra*, and it is held that the doctrine of estoppel fully applies to such cases. There is nothing in the case of *Mansur v. Haughey*, 60 Ind. 364, which conflicts with the view here expressed.

In another part of this instruction, reference is made to the special interest in the way claimed by the appellee. Counsel say : " As to the special damage, we say none is sufficiently alleged, and prospective damage won't do ; it must be a damage he, the appellant, has already sustained which will entitle him to sue alone." This position can not be maintained. One who has erected costly buildings for a particular manufacturing purpose is not bound to wait until his buildings are rendered valueless by the blocking up of the highway which supplies the only means of ingress or egress, but may proceed by injunction. 2 Story Eq. Juris., section 924.

The principle, that where a right may be extinguished by the continuance of a wrong, an action will lie, although there

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are no perceptible damages, applies to this case. "I can very well understand," says Judge STORY, "that no action lies in a cause where there is *damnum absque injuria*, that is, where damage is done without any wrong or violation of any right of the plaintiff. But I am not able to understand, how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established, as a matter of fact; in other words, that *injuria sine damno* is not actionable. On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law, that, wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages." *Webb v. The Portland Manuf'g Co.*, 3 Sumner, 189. Broom's Com. 93; Washburn Easements, 295.

The motion for a new trial assigns as a reason, "that the court erred in refusing to give to the jury instructions 8 and 9, asked for by the defendant." There are no other instructions referred to in the motion as having been refused, and we can only consider the ruling refusing the two mentioned; for it is a firmly settled rule of practice that the particular rulings to which objection is taken must be specified in the motion for a new trial. Nothing is said in the brief as to the refusal to give the eighth instruction, and we are, therefore, only required to examine the ruling refusing the ninth.

The ninth instruction asked by the appellant is as follows: "I also instruct you that there can be no valid dedication to the public of such right of way as is claimed, unless it is proved that the owner of the soil intended a dedication of the way to the public." This instruction asserts an abstract proposition of law correctly. There is no doubt that intention to dedicate is essential to constitute a valid dedication. It is not necessary that this intention should be expressly declared,

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nor is it necessary that it should be directly proved. The intent to dedicate must, however, clearly appear. "But such intent will be presumed against the owner where it appears that the easement in the street or property has been used and enjoyed by the public for a period corresponding with the statutory limitation of real actions." 2 Dill. Munic. Corp., section 637. Our statute is explicit upon this subject: "All public highways which have been or may hereafter be used as such for twenty years or more, shall be deemed public highways." Where, therefore, there has been twenty years user, the way is to be deemed a public one, and those asserting rights in it are not bound to show an original intent to dedicate. The law makes the lapse of time sufficient, without any further evidence. It was not error to refuse this instruction, for it left out of consideration the important element of the lapse of time. Instructions must not only assert correct propositions of law, but they should also assert the law in such a form as to make it fairly applicable to the particular case in which it is asked.

It is a familiar rule, that, where an instruction is substantially contained in others given, there is no error in refusing it, and, conceding the instruction under immediate mention to be correct, there was no available error in refusing to give it to the jury, for it is substantially given in other instructions. A careful examination of the instructions, which are, as appellant's counsel claim, somewhat contradictory, has satisfied us that, if any error was committed, it was in his favor and not against him.

The deeds forming appellee's chain of title do not contain any reference to the easement, nor contain the term appurtenances, and the appellant argues that they are not sufficient to carry the easement. It is not necessary that the deed conveying the principal estate should describe the subordinate, nor use the term appurtenances. The conveyance of the dominant estate carries the easement. *Keiper v. Klein*, 51 Ind. 316; *Sanzay v. Hunger*, *supra*.

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There was no error in rendering judgment for nominal damages, although no actual damages were proved. We have already discussed this question in considering the instructions.

The appellant complains of the ruling upon his motion for a *venire de novo*. His position is that the verdict is ill because it does not find whether the way was a public or a private one. The verdict is in the usual form, and finds generally for the plaintiff, and there is certainly no defect or uncertainty upon its face. Both paragraphs of the complaint were good, and the verdict may be supported upon either. There was no error in overruling appellant's motion.

What judgment a verdict will warrant, is a very different question from that presented by a motion for a *venire de novo*. So, too, is the question whether the judgment was, or was not, a proper one. Objections to the judgment must be specifically stated in the trial court, or they will not be available on appeal. No objections, other than those presented to the trial court, can be urged in the appellate court. The objection in this case was thus stated: "The defendant excepts to the judgment of the court on the verdict ordering said way to be opened up, and kept open said width." This exception can not be maintained. Whether the way was public or was private, appellee had a right to have it kept open. The owner of the servient estate has as little right to obstruct a private way as he has to obstruct a public highway. In any view of the case, appellee was entitled to the relief adjudged him.

There is no error in the record requiring a reversal, and the judgment is, therefore, affirmed.

No. 8539.

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139 140

HAINES ET AL. v. ALLEN ET AL.

WILL.—*Charitable Trust.—Intoxicating Liquors.*—A bequest in a will, devising to the trustees of a certain organized church, having trustees, and to their successors, \$1,000, to be put at interest, and the interest to be appropriated annually to the suppression of the manufacture, sale and use of intoxicating liquors, and providing that if said trustees failed for two successive years to use the interest as directed, then the whole bequest should go to the heirs of the testator, is valid.

From the Spencer Circuit Court.

D. T. Laird and *W. H. Thomas*, for appellants.

I. S. Moore and *T. F. DeBruler*, for appellees.

BICKNELL, C. C.—The last will of James D. Allen contained the following provisions:

“Item 2. I will and bequeath to the Trustees of the Methodist Episcopal Church, now organized in Rockport, Indiana, and to their successors in office, \$1,000, to be put at interest, and the interest to be applied, annually, to the payment of the salary of the preacher in charge at the time.

“Item 3. I will and bequeath to the aforesaid trustees, \$1,000, to be put at interest, and the interest to be appropriated, annually, to the suppression of manufacturing, selling or using of intoxicating liquors. Now, should the said trustees refuse or neglect for two successive years to use the above named interest as directed, in either or both cases any one of my legal heirs shall have the right to draw out both principal and interest, and divide it equally between my heirs.

“Item 8. I will that the trustees, heretofore designated, shall superintend the carrying out of this will, and the winding up of my estate, by electing one of their body as executor; but if none of their body be willing to serve, then for them to agree on some good man, outside of their body; then after the said trustees have selected an executor, it is my will that they, as a body, shall continue to see that the will be fully and faithfully carried out.”

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The will was dated March 16th, 1878; the testator died August 1st, 1878. At those dates the trustees of the Methodist Episcopal Church, in Rockport, were Lewis G. Smith, John Bayse, James P. Bennett, James H. Willian and William H. Thomas. Of these John Bayse undertook to act as executor of the will, but he soon resigned, and Willis Haines was appointed administrator with the will annexed *de bonis non*. The testator died a widower without issue; his only heirs at law were his brothers and sisters, and his nephews and nieces.

These heirs at law, in October, 1879, brought this suit against the administrator *de bonis non* and the trustees, stating in their complaint the foregoing facts and claiming that the bequest to the trustees was void for uncertainty, and that the money belonged to the heirs; and they prayed that the probate of the will, as to said item 3, should be set aside and declared void, and that said administrator should be required, in settling said estate, to pay said \$1,000 to the plaintiffs.

A demurrer to the complaint, for insufficiency of facts, was overruled, and, the defendants refusing to answer, final judgment was rendered against them upon the demurrer, that the third item of the will is void; that as to said \$1,000 the testator died intestate, and that the plaintiffs are entitled to it, and that said administrator shall pay it to them in course of distribution.

From this judgment the defendants appealed. The only error assigned is overruling the demurrer to the complaint.

There is no brief on behalf of the appellees.

The complaint alleges that the will can not be carried into execution, because it does not define what are intoxicating liquors, nor authorize the trustees to do so; and does not point out how the money shall be used to secure the object of the bequest, and because, if the trustees should fail or refuse to execute the trust, there is no beneficiary named in the will, with power to require the enforcement of the trust.

These objections can not be sustained. The phrase "intox-

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icating liquors" means liquors that will intoxicate; no definition of it is necessary.

The will need not point out any plan by which the objects of the bequest shall be accomplished. It is sufficient if the will appoints trustees, with power to appropriate the money in aid of the object named, in such manner as they shall think fit. *Whitman v. Lex*, 17 S. & R. 88; *Beekman v. Bonsor*, 23 N. Y. 298.

The will provides what shall be done, if the trustees fail to execute the trust, and where the bequest is for a general charity, such as a provision for a class of indigent persons, or for the suppression or alleviation of any of the forms of wretchedness and vice, and proper trustees are appointed to execute the bequest, it is not necessary that any individual beneficiary be named.

Preventing the use of intoxicating liquors, regarded as a means of promoting individual and social welfare, may be deemed a proper subject of charitable bequest, and whether the object shall be sought by the distribution of documents or by lectures, or by other reasonable and appropriate means, is a matter within the discretion of the trustees.

Where "certain and ascertainable trustees are appointed, with full powers to select the beneficiaries and devise a scheme or plan of application of the funds appropriated to the charitable object, the court will, through the trustees, execute the charity.

Where trustees capable of taking the legal estate were originally appointed, so that a valid use was in the first instance raised, and the case was thus brought within the jurisdiction of the court of chancery, that court will supply any defect which may arise in consequence of the death, or disability or refusal of the trustees to act. *Grimes' Ex'rs v. Harmon*, 35 Ind. 198. The following cases support the foregoing conclusions, and show that the will under consideration was valid. *De-Bruler v. Ferguson*, 54 Ind. 549; *McCord v. Ochiltree*, 8 Blackf. 15; *Vidal v. Girard's Ex'rs*, 2 How. 127; *Cruse v. Axtell*,

Kane et al. v. The State, ex rel. Woods.

50 Ind. 49; *Craig v. Secrist*, 54 Ind. 419; *The Board, etc., v. Rogers*, 55 Ind. 297; *Ex parte Lindley*, 32 Ind. 367.

The court below erred in overruling the demurrer to the complaint. The judgment of the court below ought to be reversed, and the cause remanded, with instructions to the court below to sustain the demurrer to the complaint.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is hereby in all things reversed, at the costs of the appellees, and this cause is remanded, with instructions to the court below to sustain the demurrer to the complaint.

No. 8215.

KANE ET AL. v. THE STATE, EX REL. WOODS.

INTOXICATING LIQUORS.—*Constitutional Law*.—*License to Sell*.—*Bond*.—So much of section 4 of the act of March 17th, 1875, regulating and licensing the sale of intoxicating liquors (1 R. S. 1876, p. 870), as requires the applicant for such license to give bond to the State of Indiana, conditioned, among other things, that he will pay all fines and costs that may be assessed against him for any violations of the provisions of said act, is matter properly connected with the subject of the act, and is, therefore, a constitutional and valid provision.

SAME.—*Licensee's Bond*.—*Fines and Costs*.—*Rights of Replevin Bail*.—*Subrogation*.—Where fines and costs have been assessed against one licensed to sell intoxicating liquors, for violations of the provisions of said act, and his replevin bail has been compelled to pay and has paid such fines and costs, such replevin bail may be subrogated to the rights of the State in such licensee's bond, and may recover thereon from the licensee and his sureties in such bond the amount so paid by such replevin bail, with interest and costs.

From the Fayette Circuit Court.

W. C. Forrey and R. A. Durnan, for appellants.

R. Conner, for appellee.

78	106
125	246
78	103
145	450
78	103
157	327
78	103
171	660

Kane et al. v. The State, ex rel. Woods.

Howk, J.—In this case the only error assigned by the appellants, the defendants below, is the decision of the circuit court in overruling their demurrer, for the want of sufficient facts, to the complaint of the appellee's relator.

The suit was commenced before a justice of the peace of Fayette county, by the appellee's relator against John Collins and the appellants, John Kane and Martin Hogan, as defendants. On the trial of the cause, the justice gave judgment against the defendants, from which they appealed to the circuit court. The cause was there tried by the court, and a finding was made for the appellee's relator, and judgment was rendered accordingly; and from this judgment the said Kane and Hogan only have appealed to this court.

In his complaint the appellee's relator alleged, in substance, that the said John Collins, on the 7th day of March, 1877, applied to the board of commissioners of Fayette county, Indiana, for a license to sell intoxicating liquors in less quantities than a quart at a time, to be drank on the premises in said county; that on the 10th day of March, 1877, the said John Collins and the appellants filed their bond with the auditor of said county, said Collins as principal and appellants as his sureties therein, payable to the State of Indiana in the penal sum of \$2,000, and conditioned that the said John Collins should keep an orderly and peaceable house, and should pay all fines and costs that might be assessed against him, for any violation of the provisions of an act to regulate the sale of intoxicating liquors, etc., approved March 17th, 1875, and that he would pay all judgments that might be assessed against him for civil damages for unlawful sales under said act—a copy of which bond was filed with and made part of said complaint; that said bond was accepted and approved by the auditor of said county, on the 10th day of March, 1877, and thereupon license was issued to said John Collins, for a term of one year from the 7th day of March, 1877, authorizing him to sell intoxicating liquors, according to the provisions of said act, during one year; that

said John Collins had broken the condition of said bond, in this, that on the 2d day of November, 1877, he was convicted by said Fayette Circuit Court of selling intoxicating liquors to a minor, in four cases, in August, 1877, as would appear from Order Book No. 7 of said court, said Collins at the time selling under said license and bond; that the aggregate amount of said fines and costs was \$143.94, a bill of particulars of which was filed therewith and made part thereof; that, at the request of said John Collins, the appellee's relator acknowledged himself replevin bail for the stay of execution of said fines and costs, in open court; that the said John Collins failed to pay said fines and costs, at the time said stay expired, and that the said relator was compelled to pay the same, to his great damage in the sum of \$190. Wherefore, etc.

It will be readily seen, from the allegations of this complaint, that the bond described therein was executed under and pursuant to the provisions of section 4 of "An act to regulate and license the sale of spiritous, vinous and malt and other intoxicating liquors," approved March 17th, 1875. We set out so much of this section as relates to the bond, as follows:

"Sec. 4. The board of county commissioners at such term shall grant a license to such applicant upon his giving bond to the State of Indiana, with at least two freehold sureties, resident within said county, to be approved by the county auditor, in the sum of \$2,000, conditioned that he will keep an orderly and peaceable house, and that he will pay all fines and costs that may be assessed against him for any violations of the provisions of this act, and for the payment of all judgments for civil damages growing out of unlawful sales, as provided for in this act, which bond shall be filed with the auditor of said county." 1 R. S. 1876, p. 870.

The first point made in argument by the appellants' counsel, in their brief of this cause, is, that so much of said section 4 as requires that the bond of the licensee shall be conditioned "that he will pay all fines and costs that may be

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assessed against him for any violations of the provisions of this act," is unconstitutional and void, for the reason that this requirement or provision of the statute is not expressed or contemplated in the title of the act, and is, therefore, in direct violation of the mandate, in section 19, of article 4, of the Constitution of 1851, to the effect that the subject of every act shall be expressed in its title. This point does not seem to us to be well taken. The constitutional provision referred to only requires that the subject of the act shall be expressed in its title. Certainly it does not require, as the appellants' counsel seem to think it does, that all matters properly connected with the subject of the act should also be expressed in the title thereof. In this case, the subject of the act under consideration was the regulation and license of the sale of intoxicating liquors, and this subject was clearly and explicitly expressed in the title of the act. It was not necessary that the title of the act should go further and contain an expression, or even an indication, of the various regulations and requirements of the statute, with which the applicant must comply before he would be entitled to or could obtain the license sought for. Any other construction of section 19, of article 4, of the Constitution of 1851, than the one here given, would render it necessary that the title of an act should be almost as full and explicit in its details as the act itself. Such a construction would burthen the statute books with titles long drawn out, which, practically, would be of little or no benefit to any one. We are of the opinion that the title of the 'temperance law of March 17th, 1875, sufficiently expressed the subject of the act, and that the provision of section 4 of said act, requiring the bond of the licensee to be conditioned, *inter alia*, "that he will pay all fines and costs that may be assessed against him for any violations of the provisions of this act," was not unconstitutional and void by reason of any omission or defect in the title of the act. *The State, ex rel., v. The Board, etc.*, 26 Ind. 522; *McCaslin v. The State, ex rel.*, 44 Ind. 151; *The State, ex rel., v. Tucker*,

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46 Ind. 355; *Fletcher v. The State*, 54 Ind. 462; *O'Kane v. The State*, 69 Ind. 183; *Shipley v. The City of Terre Haute*, 74 Ind. 297.

The only other question presented and discussed by the appellants' counsel, in this case, relates to the claim of the relator, that he, having paid as replevin bail the fines and costs assessed against the said John Collins, was entitled to be subrogated to the rights of the State of Indiana in the bond in suit, in so far as the said bond had been given to secure the payment of all fines and costs that might be assessed against said Collins for his violations of the provisions of the said act of March 17th, 1875. In section 131 of the criminal code of 1852, it is provided that "Every defendant in a criminal action against whom a judgment has been rendered, may stay the execution for the fine assessed and costs for ninety days from the rendition of the judgment, by entering replevin bail in like manner as is provided in civil actions; the entry of replevin bail has the same force as in civil actions." 2 R. S. 1876, p. 407. This section was re-enacted as section 285, of the criminal code of 1881, and is known as section 1860 of the "Revised Statutes of Indiana, 1881."

In section 676, of the civil code of 1852, it is provided, *inter alia*, that when any replevin bail, "or any person being surety in any undertaking whatever, has been or shall be compelled to pay any judgment or any part thereof, or shall make any payment which is applied upon such judgment by reason of such suretyship," the judgment shall not be discharged by such payment, but shall remain in force for the use of the bail, surety or other person making such payment, and, after the plaintiff is paid, so much of the judgment as remains unsatisfied may be prosecuted to execution for his use. 2 R. S. 1876, p. 279. This section is also re-enacted, as section 740 of the civil code of 1881, and is now known as section 1214 of the "Revised Statutes of Indiana, 1881."

Of this right of subrogation, it was said by the Chancellor, in *Eddy v. Traver*, 6 Paige, 521: "It is an established prin-

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ciple of equity that sureties, or those who stand in the situation of sureties, for those who pay a debt for them, are entitled to stand in the place of the creditor, or to be subrogated to all his rights as to any fund, lien or equity which he may have against any other person or property on account of the debt." So, also, in *Jones v. Tincher*, 15 Ind. 308, it was said by this court: "It may, however, be noted that the surety, having been compelled to pay the judgment, may be subrogated to the plaintiff's rights under the mortgage." Again, in 1 *White & Tudor's Lead. Cases in Equity*, 4th Am. ed., p. 136, this equitable doctrine of subrogation is thus declared: "Moreover, as soon as the surety has paid the debt, an equity arises in his favor to have all the securities, original and collateral, which the creditor holds against the person or property of the principal debtor, transferred to him, and to avail himself of them as fully as the creditor could have done: for the purpose of obtaining indemnity from the principal, he is considered as at once subrogated to all the rights, remedies and securities of the creditor; as substituted in the place of the creditor, and entitled to enforce all his liens, priorities, and means of payment, as against the principal, and to have the benefit even of securities that were given without his knowledge." The doctrine of subrogation and the rights of sureties, as here declared, were quoted with approval and acted upon by this court in the recent case of *Gerber v. Sharp*, 72 Ind. 553.

The question remains, and this is the important and controlling question in this suit, namely, Is the doctrine of subrogation applicable to the case made by the allegations of the relator's complaint? It will be seen from the summary of the complaint heretofore given, that the said John Collins, in four different cases, had been convicted, in the Fayette Circuit Court, for violations of the provisions of the temperance act of March 17th, 1875, during the year covered by his said license and the bond now in suit; that, upon these convictions, judgments had been rendered by said court against the said Collins for fines and costs, amounting in the aggregate to

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the sum of \$143.94; that the appellee's relator had, in due form of law, acknowledged himself replevin bail for the payment of each of the said judgments, at or before the expiration of the time allowed by law for the stay of execution thereon; and that the said John Collins, having failed to pay the said several judgments, at the expiration of the stay of execution thereon, the relator had been compelled to pay, and had paid, as such replevin bail, the amounts due on said judgments and costs. The relator's complaint shows upon its face that when the said John Collins committed the said violations of the provisions of the temperance act of March 17th, 1875, and when he was convicted thereof and adjudged by the court below to pay such fines and costs, on account of such violations of the law, and when, at the request of said Collins, the said relator acknowledged himself replevin bail for the payment of said judgments, the State of Indiana, the judgment creditor, had possession of the bond now in suit as the primary security for the payment of said judgments and costs, wherein the said John Collins, as principal, and the appellants as his sureties, had bound themselves, that he, the said Collins, "will pay all the fines and costs that may be assessed against him for any violations of the provisions" of said temperance law. It is very clear that the State, upon the default of said Collins in the payment of said fines and costs, might have compelled him and the appellants, as his sureties, in a suit on said bond, to pay such fines and costs. The appellee's relator having become, in due course of law and at the request of said Collins, his replevin bail for the payment of the judgments rendered for said fines and costs, and having been compelled to pay and having paid, as such replevin bail, the said several judgments for said fines and costs, we know of no possible reason why the relator should not be permitted to avail himself of the equitable doctrine of subrogation, and should not be subrogated to all the rights of the State of Indiana, the judgment creditor, in the bond primarily given by the said Collins to secure the payment of all fines and costs that might

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be assessed against him for any violations of the provisions of the said temperance law.

Our conclusion is, that the relator's complaint stated facts sufficient to constitute a cause of action, and that the demurrer thereto was correctly overruled. *United States v. Hunter*, 5 Mason, 62; *Hunter v. The United States*, 5 Peters, 172.

The judgment is affirmed, at the appellants' costs.

No. 8192.

THE SUPREME LODGE, KNIGHTS OF HONOR OF THE WORLD,
v. JOHNSON.

PRACTICE.—Exceptions, How Saved.—Exceptions taken during the progress of a trial, under the Code of 1852, must be saved in bills filed at the time, unless time be then granted beyond the term for filing the bill.

SAME.—New Trial.—Bill of Exceptions.—Upon the overruling of a motion for a new trial, time may be given for filing a bill containing the evidence.

SAME.—Instructions.—In order to save any question in reference to instructions, under sections 324-5 of the Code, it must appear that the same were filed.

BENEVOLENT SOCIETY.—Certificate.—Evidence.—Presumption.—In an action upon a contract for life insurance in the shape of a certificate of membership, reciting that the deceased was a "beneficiary member in good standing" in a benevolent association, and that upon his death a sum named would be paid, "provided he be in good standing when he dies," the certificate is proof of the good standing of the party named at the time issued, and such standing will be presumed to have continued, in the absence of contrary evidence.

SAME.—Burden of Proof.—In such case the burden was on the society to show that, by reason of his conduct, or his failure to comply with the regulations or requirements of the society, the deceased had lost his good standing.

SAME.—By-Law.—Notice of Assessment.—Under the by-law of such society (for which see opinion), a member was entitled to notice of assessment, before he could be suspended for non-payment.

Proof of service or giving of notice involves proof of its contents.

78	110
129	502
78	110
138	19
78	110
143	77
78	110
160	132
78	110
164	438
78	110
165	242

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From the Marion Superior Court.

P. W. Bartholomew, N. B. Taylor, F. Rand and E. Taylor,
for appellant.

T. S. Rollins, G. H. Ryman and W. W. Pringle, for ap-
pellee.

WOODS, J.—The single question presented in this record is, whether the verdict is in accordance with the evidence. Counsel have discussed the rulings of the court in admitting evidence, and in giving and refusing instructions, but exceptions to these rulings have not been saved. The trial was had, and the motion for a new trial was filed, at the September term, 1878, but no exception was then saved, nor time allowed for filing a bill of exceptions. At the ensuing October term of the court, upon overruling the motion for a new trial, the court gave the appellant time for filing a bill of exceptions, and within the time so allowed a bill was filed. For the purpose of bringing the evidence into the record, this was sufficient, but not for the purpose of saving any exceptions taken at the prior term of court when the trial was had. *Sohn v. Marion, etc., G. R. Co.*, 73 Ind. 77; *Backus v. Galentine*, 76 Ind. 367.

This bill of exceptions professes to set out the instructions given by the court, and one which the court refused to give, and to show exceptions by the appellant to the giving and refusing thereof; but these exceptions are not saved, either by the bill of exceptions or in the mode prescribed by sections 324 and 325 of the code,—not by the bill of exceptions, for the reason already stated, and not in the other mode, because it is not shown that the instructions were filed. The sixth clause of section 324 requires that "All instructions given by the court must be signed by the judge, *and filed*, together with those asked for by the parties, as a part of the record."

Under the code of 1881, the practice in this respect is so far modified as to require that the memorandum, "given and excepted to," or "refused and excepted to," shall "be signed

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by the judge, and *dated*." The filing is still necessary. Revised Statutes of 1881, p. 100, sections 533, 535.

The appellee, as the widow of Benj. F. Johnson, sued the appellant upon the following certificate:

"No.——

\$2,000.00

"KNIGHTS OF HONOR: BENEFIT CERTIFICATE.

"This certifies that Bro. Benjamin F. Johnson has received the degree of Manhood; that he is a beneficiary member of the lodge in good standing; that in accordance with, and under the provisions of, the laws governing the order, the sum of \$2,000 will be paid by the Supreme Lodge, Knights of Honor of the World, as a benefit, upon due notice of his death and the surrender of this certificate, to such person or persons as he may, by will or entry on record book of this lodge, or on the face of this certificate, direct the same to be paid, provided he be in good standing when he dies.

"Given under the seal of Victoria Lodge No. 22, Knights of Honor, at Indianapolis, Ind., this 25th day of April, 1877.

"J. B. BIDWELL, Dictator.

"GEO. W. GADD, Reporter."

The proper direction for payment to the appellee was made upon the face of the certificate.

The only point in dispute upon the evidence is upon the question whether Johnson, at the time of his death, was a member of the association in good standing. The only testimony introduced on this subject by the appellee, in the first instance, was the certificate, of which a copy has been given. The appellee claims, and the court, it seems, instructed the jury, that this certificate showed that the deceased was in good standing when the certificate was issued to him, and that, in the absence of contrary evidence, it might be presumed that he remained in good standing until he died.

The appellant, on the other hand, offered evidence to show that he was expelled, or suspended, for non-payment of an assessment. The validity of this suspension was disputed by the appellee, for the want of proper notice of the assessment;

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and evidence was offered to show that the deceased had been reinstated in his membership and good standing. The appellant denied the reinstatement, and offered evidence to show that the application to be reinstated was rejected by the lodge.

The case is within the rule, that a state of facts shown to have once existed may be presumed to have continued.

The court, therefore, did not err in instructing the jury that in the absence of contrary evidence they might presume that the deceased continued in good standing in the order until he died, it appearing by the certificate that at the date of its issue he had such standing. It is not apparent from the certificate in what the good standing of a member was deemed to consist. Counsel for the appellant suggest that, at most, the certificate should be deemed evidence of good standing only until another assessment had been made against the holder; but it does not appear from the certificate that any assessment had been or could thereafter be made, or, if made, that the failure to pay it could affect the standing of the member. The production of the certificate, with the requisite direction endorsed upon it for payment to the appellee, evidence of the husband's death, with perhaps some other formal proof, made a *prima facie* case for the plaintiff; and if, by reason of his conduct or failure to comply with the regulations or requirements of the society, the deceased had lost his good standing before he died, the fact was peculiarly within the knowledge of the association, and the burden of proof on the subject upon the appellant. Whether the proof was admissible under the general issue, or the fact ought to have been specially pleaded, we are not called on to decide.

By the rules of the order, assessments were made from time to time for the purpose of keeping in the supreme treasury a sum not less than \$2,000, that being the amount of a single benefit. The supreme reporter, as each assessment was made, sent a notification thereof to each subordinate lodge, and the

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reporter of that lodge was required to notify each individual member. The portion of the by-law directly relevant to the case in hand is as follows: "And each member shall be notified by the reporter of this lodge of said death, and assessed to replace in the treasury the amount forwarded to the supreme treasury, and such notice shall be official and sufficient notice to every member of this lodge. Each member shall pay the amount due, on the notice of the reporter of this lodge, within thirty days from the date such notice" (from the supreme reporter) "was read in open lodge, and any member failing to pay such assessment within thirty days, shall be suspended from this lodge."

The counsel for the appellant contend that, under this by-law, "Johnson was bound to pay the 27th assessment within thirty days from the date the notice of it from the supreme lodge to the subordinate lodge was read in open lodge; under the law he was not entitled to thirty days' notice, but was to pay the assessment within the time specified upon notice from the reporter of the subordinate lodge; that is, within thirty days from the reading of the notice of assessment from the supreme lodge to the subordinate lodge of which he was a member."

Conceding, without affirming, the correctness of this interpretation, our judgment is that the verdict of the jury may be justified on the ground that the deceased was not validly suspended. The evidence fails to show, with satisfactory clearness, that Johnson was notified of the 27th assessment, for the non-payment of which it was attempted to suspend him. The record of his suspension is entirely silent on the subject of notice. The proof shows that he was not present at the time of the suspension, nor when the notification from the supreme lodge was received and read in open lodge, if, indeed, it was so read at all. The record shows only the receipt, and not the reading. One witness testified to the reading, but it is not clear that he testified from recollection, so much as upon supposition based on the usual mode of doing business in the

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lodge. As to the fact of notice being sent to Johnson, the reporter's testimony amounts to an impression only that he sent the notice, either by mail or by one or the other of two individuals named, but that he did send it either way, or that it reached Johnson, was left in such doubt that the verdict may well stand on the supposition that the notice was not sent, or, if sent, that it was not received.

No proof was offered of the contents of the notice. It was clearly necessary that it should state the time of the reading in open lodge of the notice received from the supreme lodge, so that on receipt of the notice Johnson could know within what time he was required to pay.

Some stress is laid in argument upon the fact that Johnson made an application to be reinstated, and that it must therefore be that he received notice of the assessment. It does not follow, however, that he received it before the date of the suspension. So far as appears, his application for reinstatement may have been based in whole or in part upon the ground that he had received no notice of the assessment.

The following extract is from the opinion of the judge who tried the case at special term, and is given here for the sake of the authorities cited:

"Expulsion and disfranchisement of members. See generally *Osgood v. Nelson*, 4 Eng. Rep. (Moak's ed.) 27, note 10; *Field Corp.*, section 64, etc.; *Waring v. Medical Society*, 8 Am. Law Reg. (N. S.) 533 note; *High Ex. Rem.*, section 291, etc.

"As a general rule a member can not be expelled without notice. *Wood v. Woad*, 10 Eng. Rep. (Moak's ed.) 372 note; *Field Corp.*, section 65; *High Ex. Rem.* 11, 295. And if expulsion is ordered without notice, the action of the corporation will be deemed a nullity. *Wood v. Woad*, *supra*; *People v. The German, etc., Church*, 53 N. Y. 103.

"Query? Whether a member can be expelled for non-payment of dues. *Diligent, etc., Co. v. Commonwealth*, 75 Pa. St. 291.

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"If a member be improperly removed, mandamus will lie to compel his restoration. *Osgood v. Nelson, supra*; High Ex. Rem., sec. 294.

"To this proposition there are some exceptions. *People v. The German, etc., Church*, 53 N. Y. 103.

"Otherwise, if expelled after notice and hearing, the decision being *bona fide*. *Wood v. Woad, supra*; *Gregg v. Massachusetts Medical Society*, 111 Mass. 185; High Ex. Rem., section 292. That a record of the trial should be kept. *Roehler v. Mechanics' Aid Society*, 22 Mich. 86."

Judgment affirmed, with costs.

No. 7658.

EASTER v. FLEMING ET AL.

PERSONAL PROPERTY.—Conversion.—Right of Possession.—In an action to recover for the conversion of public property, the plaintiff must show a right of possession in himself at the time he began his action.

SAME.—Action to Recover.—Title.—In actions for the recovery of personal property, the plaintiff must recover on the strength of his own title, and not upon the weakness of his adversary's.

SAME.—Sheriff's Sale.—If a claimant of personal property has no title thereto, he can not recover it from one in possession claiming title by virtue of a sheriff's sale, although the sale was irregular.

From the Clay Circuit Court.

S. W. Curtis, E. S. Holliday and J. A. McNutt, for appellant.

G. A. Knight and C. H. Knight, for appellees.

ELLIOTT, C. J.—Counsel have discussed only one of the errors alleged, and that is the one assigned upon the ruling refusing a new trial.

The evidence is conflicting, but the verdict is not entirely unsupported. We put aside, without further comment, the

argument that appellant is entitled to a new trial upon the ground that the verdict is contrary to the evidence.

Appellant assails several of the instructions given by the court upon the request of the appellees. The first, second, third and fourth are asserted to be erroneous, for the reason that they do not correctly state the law upon the subject of estoppel. It is said that they leave out of consideration the important element that the act relied upon as creating the estoppel must have induced some change in the position of the party insisting upon the estoppel. The instructions are not justly subject to this objection, and, as it is the only one asserted or suggested, we presume there are no others.

The seventh instruction given, counsel say, "states the law correctly, but there is no evidence to which it is applicable." We need only remark that there was evidence to which the instruction was relevant.

The eighth instruction asserted that the appellant could not recover unless he showed a right to the possession of the personal property at the time the action was commenced. The complaint is for the conversion of personal property, and it is an elementary doctrine, that, in such cases, the plaintiff must show a right of possession in himself at the time he began his action. *Picquet v. McKay*, 2 Blackf. 465.

The tenth instruction given by the court upon its own motion is also complained of, but without substantial cause. This instruction asserts the well known doctrine, that, in actions for the recovery of personal property, the plaintiff must recover upon the strength of his own title, and not upon the weakness of his adversary's. Under the allegations of the complaint the instruction was a proper one.

The appellant asked the following instruction: "The law requires that before personal property shall be sold upon execution, the sheriff shall post up not less than three notices in the township where the property is situated; and, before he can lawfully sell personal property, he must have the property present at the place specified in the notice, and unless the

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property is at the point specified for the sale, and subject to inspection of the persons present who bid, or are likely to bid, the sale made at a point five or ten minutes' walk from the place where the property is situate at the time of sale, is absolutely void as to such property, and does not convey any title whatever to the purchaser." The court gave the instruction as asked, but added to it the following: "This is true, as an abstract legal proposition, but irregularities, if any, in the sale under which the defendants purchased the property, would not enhance plaintiff's right of recovery herein, nor would regularities in the sale of property on an execution against Rodney & Co. defeat plaintiff's right of recovery herein, if, at the time of sale, plaintiff had and was entitled to the possession of the property then sold. In other words, a sale of Easter's property on an execution against Rodney & Co., regular in all the acts of the sheriff, would, of itself, confer no title in such property on the purchaser." There was no error in modifying the instruction. Although somewhat obscurely worded, the evident meaning is, that, if Easter had no title or claim to the property, then the fact that the sale made by the sheriff was irregular would not create one; if he had, then the fact that the sale was entirely legal and regular would not defeat it. It is unquestionably true, that, if the claimant of personal property has no title, he can not recover it from one in possession and who claims it by virtue of a sheriff's sale, although the sale was irregular; and it is equally true, that, if he was the owner, his title could not be defeated by seizure and sale upon an execution issued against some other person.

Complaint is made of the admission of evidence, but the question is not properly before us for the reason, among others, that the record does not show an exception taken at the time the ruling was made. It is settled, both by the statute and the adjudged cases, that an exception must be taken at the time the ruling is made, although time may be

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given to reduce the exception to writing. *Sohn v. The Marion, etc., G. R. Co.*, 73 Ind. 77.

Judgment affirmed.

78	119
129	161
190	182
78	119
162	160

No. 8223.

RIDGEWAY ET AL. v. THE FIRST NATIONAL BANK OF EVANSVILLE ET AL.

REDEMPTION.—*Rents*.—Under the statute of 1861, giving to the judgment defendant the right to occupy lands sold on execution, for the period of a year from the sale, with a liability for rents if he do not redeem, the rents, during that period, are his absolutely, in his own right, and not as trustee for the purchaser, and if he be insolvent, and assign the rents in payment of a just debt, the assignee is not liable therefor to the purchaser. ELLIOTT, C. J., and WOODS, J., dissent.

From the Vanderburgh Superior Court.

J. M. Warren and G. Palmer, for appellants.

A. Iglehart, T. E. Garvin, J. E. Iglehart and A. L. Robinson, for appellees.

MORRIS, C.—The appellants, who were the plaintiffs below, allege in their complaint, that on the 17th day of July, 1875, by virtue of an order of sale, issued out of the Vanderburgh Circuit Court, in an action to foreclose a mortgage, brought by the First National Bank of Shawneetown, Illinois, against the appellee Lamphear, the sheriff of Vanderburgh county, sold, in due form of law, to the said First National Bank of Shawneetown, lots 17 and 18, in block 2, in the eastern enlargement of the city of Evansville, and State of Indiana, for the sum of \$3,500; that said bank paid the purchase-money, and the sheriff executed and delivered to it a proper certificate of purchase for said lots, which the bank, by its deed in writing, duly assigned and transferred to the plaintiffs. That on the 8th day of May, 1878, said lots not having been re-

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deemed, were by the sheriff properly conveyed to the plaintiffs. It is further stated that said lots were occupied for a year from the date of said sale by one William H. Caldwell, as a tenant of said Lamphear, at a rental of forty dollars per month; that Lamphear was indebted to the First National Bank of Evansville, Indiana, in the sum of \$3,000; that this indebtedness had been of long standing; that Lamphear was insolvent and unable to redeem said lots from said sale, which was well known to the bank; that said bank procured Lamphear to assign to it, in part payment of said indebtedness, said rents; that by virtue of said assignment it had collected the rents of the tenant, Caldwell, for one year from the day of sale, amounting to the sum of \$480. For this sum and interest thereon, the appellants demand judgment.

The appellees demurred, separately, to the complaint. Their demurrers were sustained, and the appellants excepted. They declined to amend, and final judgment was given for appellees.

The error assigned is, that the court below erred in sustaining the demurrers of the appellees.

The appellee Lamphear has filed in this court a confession of the error assigned.

The appellants insist that the sheriff's deed to them related back to the sale of the lots, so as to entitle them to the rents during the year allowed by law for redemption. This is the only question in the case.

That the appellants' deed took effect, by relation from the sale, so as to protect their purchase against intervening claims, admits, we think, of no doubt. The relation back of the deed, so as to give it effect from the day of the sale, is allowed from necessity, to avoid injury to the operation of the deed from events happening between its execution and the sale. 4 Kent Com. 454; *Ashley v. Eberts*, 22 Ind. 55; *Jackson v. Ramsay*, 3 Cow. 75; *Bellows v. McGinnis*, 17 Ind. 64.

The question, then, is, did the purchaser at the sheriff's sale buy the lots subject to the right of the judgment debtor to

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receive in his own right and enjoy the rents for one year from the day of sale? or did they purchase subject to his right to receive in trust only, and hold for them, the rents for one year? If the purchase was made subject to the right of Lamphear to receive for himself the rents, then it follows that the appellants can not, by invoking the doctrine of relation, assert title to the rent of the lots.

The statute of 1861, in force when this sale was made, provided that "the judgment debtor shall be entitled to the possession of the premises for one year after the sale, and in case they are not redeemed at the end of the year, as provided in this act, he shall be liable to the purchaser for their reasonable rents and profits."

This provision gives to the debtor the right to possess and enjoy the premises for one year from the day of sale. It gives him the right to whatever the premises may produce as clearly as it gives him the right to their possession. The crops growing and maturing on the premises before the expiration of the year are his; they do not belong to the purchaser. And, if he fails to redeem within the year, he is liable to the purchaser, not for what he has made the premises produce, but for what they should have produced—"their reasonable rents and profits." To turn the judgment debtor into a trustee to hold the rents and profits of the premises sold for the purchaser, would be equally in violation of the letter and spirit of the law.

We conclude, then, that a purchaser at sheriff's sale under the law of 1861, buys subject to the right of the judgment debtor to retain possession of the premises for one year, and to receive in his own right the rents and profits for that year. And this conclusion we understand to be in accordance with the decisions of the Supreme Court.

In the case of *Clements v. Robinson*, 54 Ind. 599, it was held that, under this provision of the statute of 1861, no person, other than the judgment debtor, could be made liable to the

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purchaser for the receipt of the rents and profits during the period allowed for redemption of premises sold at sheriff's sale.

In the case of *Powell v. DeHart*, 55 Ind. 94, Judge HOWK, in speaking of this provision, says:

"This language is too plain for construction. It clearly imposes a liability, in the event of the non-redemption of lands or lots sold by the sheriff, for their reasonable rents and profits, for the year in which they might have been redeemed, in favor of the purchaser, upon the judgment debtor, and upon no one else. It is not the owner of the equity of redemption, nor the tenant in possession, but it is the judgment debtor, as such, the man who owes the money, whom the statute makes liable to the purchaser, for the reasonable rents and profits of the premises, sold at sheriff's sale, for the year that the purchaser is not entitled to the possession, if the premises are not redeemed in the mode prescribed by law."

The appellants insist that the case of *Gale v. Parks*, 58 Ind. 117, is so entirely in conflict with the cases of *Clements v. Robinson*, and *Powell v. DeHart*, *supra*, as that it must be regarded as overruling them. Parks alleged, in the second paragraph of his complaint, that he had obtained a decree of foreclosure against Gale upon land stated to have been occupied by Gale, a sale under the decree to him, a certificate of purchase, the non-redemption of the land and a sheriff's deed to Parks, the occupation of the land sold by Gale, etc.

Gale demurred to this paragraph, and, in speaking upon the ruling of the court below upon this demurrer, Judge BIDDLE says:

"The only point he," Gale, "makes on the demurrer is the unconstitutionality of the last clause of section 2 of the redemption act of June 4th, 1861, * * enacting that if the premises are sold and not redeemed at the end of the year by the judgment debtor, as provided in the act, he shall be liable to the purchaser for their reasonable rents and profits. The ground taken is, that this provision is not included in the title of the act. We think the clause is constitutional, but we need not

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pause to settle the constitutional question, as we think the appellee might have recovered without the enactment complained of."

Judge BIDDLE's meaning is not quite as clear as it might be, but, as he does not mention the previous cases upon the subject, it would hardly be just to him to suppose that he intended to overrule them.

In the case of *Hollenback v. Blackmore*, 70 Ind. 234, the doctrine of relation is stated to be, "that 'where there are divers acts concurrent to be done to make a conveyance, estate or other thing, the original act shall be preferred; and to this the other acts shall have relation.'" The doctrine does not apply to sheriff's sales and deeds with any more force than it does to other conveyances. If A. agrees in writing with B. that, in consideration of \$1,000 paid down by B., he will in one year convey to him a farm and put him in possession of it, the conveyance, when executed, would relate back to the agreement as the principal act, but no one would think that it would by relation entitle B. to the income of the farm prior to the day on which, by the agreement, it was to be actually made and delivered. It would, by relation, protect the grantee against the effects of an adverse possession commenced after the agreement and before its actual execution, and would be valid, though at the time of its execution the farm was in the adverse possession of another. This doctrine was invented, if we may use the expression, for the promotion of justice, and it will not, therefore, be applied so as to work injustice or wrong to any one. It is believed that no case can be found where the doctrine has been so applied as to divest the party, against whom it has been invoked, of a right given by the law, unless he had agreed to surrender it. To suppose that the law would, by the application of the doctrine of relation, divest a party of the rents of an estate, the right to which the law itself conferred upon him, would be singular indeed, if not absurd.

In the case of *Frost v. Beekman*, 1 Johns. Ch. 288, it

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was held that the doctrine should not be so applied as to work injustice to the rights of innocent parties acquired between the events which it was proposed to unite by relation, nor by making that tortious which was lawful originally. As where a deed, made in pursuance of a previous contract to sell, as between the parties, would relate back to the date of the contract, but it will not be allowed to do so to the injury of intermediate innocent purchasers. The doctrine is stated by Judge THOMPSON thus: "It is a general rule, with respect to the doctrine of relation, that it shall not do wrong to strangers; as between the parties it may be adopted for the advancement of justice." *Fite v. Doe*, 1 Blackf. 127; *Jackson v. Bard*, 4 Johns. 230 (4 Am. Dec. 267).

The redemption law of 1861 applies only to contracts made after it took effect. It enters, as a silent term, into all contracts made since it became a law. It follows, therefore, that the case just supposed, is the case in hearing. The Bank of Shawneetown, Illinois, took its certificate with the understanding that Lamphear was to have and enjoy the rents, in his own right, not as its trustee or tenant, of the lots for one year. The law, which was a part of this contract, gave him this right. To maintain the law is to protect him in the legal enjoyment of this right.

The record shows, and the complaint alleges the fact, that Lamphear applied those rents in the payment of an honest debt of long standing. If these rents were his, it was for him, as it is for every property owner, to determine how he could best use them, provided the proposed use should be lawful. It is not only lawful, but commendable, for a man to apply whatever he may have to the payment of his debts. This Lamphear did. And this fact distinguishes this from the case of *Davis v. Newcomb*, 72 Ind. 413. We understand it to be conceded in that case, that the judgment debtor is entitled to the income of land sold by the sheriff, during the year allowed for redemption, and to the right, within the year, to dispose of the same. Here Lamphear, as stated in the com-

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plaint, assigned within the year, the rents in payment of a debt. This did not give the purchaser at sheriff's sale a right of action against the assignee of the rents. *Wilson v. Powers*, 66 Ind. 75; *Graves v. Kent*, 67 Ind. 38.

We think the judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be in all things affirmed in favor of The First National Bank of Evansville, at the costs of the appellant; and that the judgment in favor of Lamphear be in all things reversed, at his costs. Cause remanded.

ON PETITION FOR A REHEARING.

FRANKLIN, C.—Lamphear's property was sold on execution; he failed to redeem; during the year for redemption it was in the possession of a tenant; he, in payment of an indebtedness, sold and transferred the rents to the First National Bank of Evansville, which had received them and credited Lamphear therefor. Appellants, as assignees of the certificate of purchase at the sheriff's sale, received a deed for the property, and sued appellees for the rents. That the suit was rightly brought against Lamphear, can not be successfully questioned. The redemption statute expressly provides, that, if the judgment debtor fails to redeem within the year, as provided in the act, he shall be liable to the purchaser for the reasonable rents and profits. And it has been insisted by appellants' counsel, in a lengthy and learned brief, and by oral argument, that the action can also be maintained against the First National Bank, and that their petition for a rehearing as to it ought to be granted. This court has decided that, while the judgment debtor could be sued for the rents, third parties, who own or occupied the premises, could not. *Clements v. Robinson*, 54 Ind. 599; *Powell v. DeHart*, 55 Ind. 94; *Wilson v. Powers*, 66 Ind. 75; *Graves v. Kent*, 67 Ind. 38.

The case of *Gale v. Parks*, 58 Ind. 117, we think is not in point. That was a suit for the rents, against the judgment debtor alone, and this question could not legitimately arise in

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the case, and nothing in relation to the question here involved was there decided.

The case of *Davis v. Newcomb*, 72 Ind. 413, seems to come nearer in conflict with the previous decisions above named. This was a petition filed in the Marion Circuit Court, in the proceedings of the assignment of Benjamin F. Riley for the benefit of his creditors, to Newcomb as assignee, by the purchasers of Riley's real estate, previous to said assignment, to require said Newcomb to pay to them the rents which he had received from said real estate during the year for redemption. These funds were yet in the hands of the assignee, in the custody of the court, and subject to its order. And in that case the court held that, although no lien, either legal or equitable, could be fastened upon the fund, yet the court, in the exercise of its equitable powers, could and ought to have ordered the fund turned over to the plaintiffs, in preference to any claims of general creditors. In that case the court further says: "He (Riley) could not have been restrained, it may be, from collecting and appropriating the rents to his own use. He might have sold and transferred the possession, or the rents of the property, to a good faith purchaser."

In the case at bar, the rents did not remain in the custody of the court, or any agent, trustee or intermediate person, but had fully passed into the ownership of a good faith creditor in payment of Lamphear's indebtedness. And we can not see any difference between this and if the bank had paid Lamphear the money for the rents; there were no intervening secret equities to be cut off by the want of notice. We think the case under consideration is plainly distinguishable from the Newcomb case, and is not required thereby to be reversed as to the bank. Since this case was decided in June last, in the case of *Connelly v. Dickson*, 76 Ind. 440, the question of the appointment of a receiver to collect and hold the rents during the year for redemption, where the property was in the hands of a tenant, was before this court,

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and it was then held that the court possessed such power. We do not think the point decided in that case conflicts with the former decision of this case. In this case the judgment debtor was not interfered with in any way in the management of the rents. He had a right to collect them and use them; the tenant had a right to pay them to him. And if the judgment debtor saw cause to pay them out on a good faith indebtedness, or buy something to live upon, and had consumed it, the purchaser at sheriff's sale, having no lien upon them either legal or equitable, we do not think that he could follow the money and collect the amount from the persons so receiving it. If he wanted the rents held or his claim fastened upon them, he ought to have taken steps to have had it done, before the debtor had made a final disposition of them.

We think the former decision in this case ought to be adhered to, and the petition for a rehearing overruled.

PER CURIAM.—Petition overruled.

ELLIOTT, C. J., and WOODS, J., dissent.

DISSENTING OPINION.

ELLIOTT, C. J.—I am for granting the petition. I think the reasoning and decision in the cases of *Davis v. Newcomb*, 72 Ind. 413, and *Connelly v. Dickson*, 76 Ind. 440, require us to hold that the person who enters into possession under the judgment debtor shall be held liable for rent.

I am influenced by an additional reason. The assignee or grantee of the judgment debtor can not, unless fundamental principles are disregarded, hold possession under better terms than his grantor or assignor. As the right to one year's possession by the judgment debtor is burdened with the obligation to pay rent, that obligation passes with the possession of the land to all who come in under the debtor. Unless this be so, we shall have the judgment debtor transferring a broader right and greater title than he possessed.

 Stapp, Adm'r, v. Davis, Adm'r, et al.

No. 8422.

STAPP, ADM'R, v. DAVIS, ADM'R, ET AL.

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171	91

DEFAULT.—*What Admitted by.*—As a general rule, a default admits the facts stated in the complaint, but not allegations of quantity or value.

SAME.—*Answer in Defence by one of two Defendants.*—Where one of two defendants answers a defence which will defeat the entire action, it will inure to the benefit of both, although one suffers a default.

SAME.—*Separate Defences.*—Where the defences are distinct and separate, and the defence pleaded exonerates one defendant only, the plaintiff may have judgment against the defendant defaulted, although he fails as to the one who pleads.

From the Dearborn Circuit Court.

D. H. Stapp, H. D. McMullen, D. T. Downey and J. A. Parks, for appellant.

W. S. Holman, for appellees.

ELLIOTT, C. J.—Elam H. Davis, administrator of the estate of William Brewington, deceased, and Joshua Brewington, were jointly sued by the appellant. Joshua Brewington did not answer the complaint, and a default was entered against him. An issue was joined between appellant and Elam H. Davis, administrator, and was submitted to a jury for trial.

Appellant very earnestly insists that he is entitled to a new trial as to both of the appellees for the reason that the verdict is not sustained by the evidence. It is enough for us to say that there was evidence justifying the conclusion reached by the jury. This disposes of the case so far as concerns the appellee who made a defence to the action.

The question presented as to the right to a reversal against the defendant who suffered default is different. The general rule is that the failure to answer a complaint admits all the material allegations which it contains except such as relate to the damages. The cause of action, but not the damages, is admitted by the default. *Briggs v. Sneghan*, 45 Ind. 14. This is a general, but not an universal rule. It prevails where there

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is a single defendant, and where, although there are two or more defendants, the causes of action are distinct and several. It does not prevail where two or more persons are sued and one makes a defence which if sustained will defeat the entire right of recovery. In such a case the defence inures to the benefit of all the defendants, as well those who defend as those who suffer default. *Kincaid v. Purcell*, 1 Ind. 324; *King v. The State*, 15 Ind. 64; *Sutherlin v. Mullis*, 17 Ind. 19; *Mullendore v. Silvers*, 34 Ind. 98.

The defence in this case inured to the benefit of both the appellees so far as the cause of action set forth in one of the paragraphs of the complaint is concerned, but not as to the cause of action stated in another of the paragraphs. The causes are different and distinct, and upon one of them the appellant was clearly entitled to recover against the appellee Joshua Brewington. His own testimony shows a right of action against him, and one so far separate and distinct from that asserted against him and his co-defendant as to entitle the appellant to a recovery. As the testimony of Joshua Brewington discloses a right of action against him in favor of the appellant, and as such right of action may be treated as a distinct and several one, we think appellant is entitled to a new trial as against the said Joshua, although not as against his co-appellee.

The judgment as to Elam H. Davis, administrator, is affirmed; and, as to the appellee Joshua Brewington, reversed, with instructions to sustain appellant's motion for a new trial as to him.

Roberts *et al.* v. Porter *et al.*

No. 7334.

ROBERTS ET AL. v. PORTER ET AL.

REPLEVIN.—*Pleading.*—*Complaint.*—*Verdict.*—*Defects Cured.*—A complaint in replevin, which alleges that the defendants unlawfully and wrongfully took from the plaintiffs, and converted to their own use, the following described personal property, etc., shows with sufficient certainty, at least after verdict, that the property was taken without leave and had not been returned.

SAME.—*Competency of Witnesses.*—*Husband and Wife.*—*Practice.*—In an action of replevin, for the recovery of the husband's personal property, his wife was not a competent witness as to matters for or against him, under the provisions of section 2 of the act of March 11th, 1867, defining who shall be competent witnesses.

From the Huntington Circuit Court.

B. F. Ibach, for appellants.

J. C. Branyan and *C. W. Watkins*, for appellees.

Howk, J.—The appellees sued the appellants to recover damages for the alleged unlawful and wrongful taking and conversion to their own use of certain personal property, particularly described and of the total value of two hundred and fourteen dollars. The appellants answered by a general denial of the complaint. The issues joined were tried by a jury, and a verdict was returned for the appellees, assessing their damages in the sum of one hundred and seventy-five dollars, and the court rendered judgment on the verdict.

The appellants have assigned the following errors:

1. The complaint does not state facts sufficient to constitute a cause of action; and,
2. The court erred in overruling their motion for a new trial.

In discussing the question of the sufficiency of the complaint, the appellants' counsel says: "The complaint is insufficient, for the reason that there is no allegation that the goods were taken without leave and that the same had not been returned." It was alleged in the complaint that the appellants, "on the 9th day of March, 1878, unlawfully and

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wrongfully took from the plaintiffs, and converted to their own use, the following described personal property," etc. These allegations were sufficient, at least after verdict, to show that the property had been taken without leave and had not been returned. The appellants did not demur to the complaint, and its sufficiency is called in question for the first time in this court. There are many cases in which this court has held that objections to a complaint, which would have been considered as well taken if they had been presented by demurrer, were regarded as obviated and cured by the subsequent trial and verdict. *Donellan v. Hardy*, 57 Ind. 393; *Scott v. Zartman*, 61 Ind. 328; *Galvin v. Woollen*, 66 Ind. 464; *Smith v. Freeman*, 71 Ind. 85; *The Indianapolis, etc., Railroad Co. v. McCaffery*, 72 Ind. 294. Conceding, without deciding, in the case at bar, that the appellants' objections to the complaint, if they had been presented by a demurrer for the want of facts, would have been well taken, we are of the opinion that they were obviated and cured by the verdict.

The first cause for a new trial assigned by the appellants, in their motion therefor, was as follows:

"1st. The court erred in admitting in evidence, over the objections of defendants, the testimony of Martha J. Porter, the wife of James S. Porter, which evidence consisted of what these defendants had done, in taking the property set out in the complaint, and what they had done when a previous levy was made, when the said property was set off to her as the property of her husband."

It appears from the bill of exceptions, which is properly in the record, that, on the trial of the cause, the appellees introduced Martha J. Porter, as a witness in their behalf, who testified as follows: "I am the wife of my co-plaintiff. The property described in the complaint belongs to my husband." Over the objections and exceptions of the appellants, she was then allowed by the court to testify at length to the merits of the cause. The trial of this cause, in the circuit court, took

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place in April, 1878. At that time the law of this State on the subject of the competency of witnesses was the act of March 11th, 1867, "defining who shall be competent witnesses in any court or judicial proceeding in this State," etc. 2 R. S. 1876, p. 132. In section 2 of said act it was provided, among other things, that "husband and wife as to matters for or against each other, or as to communications made to each other during marriage, except that the wife shall be a competent witness in cases of prosecution against the husband for assault and battery upon the person of his wife, and except also that in suits by the husband and wife jointly for an assault and battery upon the wife, such wife shall be a competent witness to prove the assault and battery; * * * * * shall not in any case be competent witnesses," etc. It is very clear that the case at bar does not come within the exceptions in this statute, and therefore it follows that the appellee Martha J. Porter was not a competent witness on the trial of this cause. *Stanley v. Schultz*, 47 Ind. 217.

It is claimed, however, by appellees' counsel, as we understand their argument, that Martha J. Porter was a competent witness for the appellees under and by force of the provisions of section 2 of the act of March 11th, 1861, amendatory of the act of March 5th, 1859, supplemental to the exemption law of February 17th, 1852. In this section 2, it was provided "That in any case where the execution defendant is absent from this State the wife of said defendant may make out the schedule required in this act, and verify the same by her affidavit, and the said schedule, when so made and delivered to the officer holding the writ, shall entitle the wife to claim and hold for her husband the amount of property which by law is exempt from execution." Acts of 1861, p. 120. This section does not in terms, or by any fair implication, as it seems to us, make the wife a competent witness, either for or against her husband, in any suit brought by him for the unlawful taking or wrongful conversion of such exempted property. But, if it could be said that, under said section 2,

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the wife could be a competent witness, either for or against her husband, in any such suit as the one now before us, it is certain, we think, that after the enactment of the above mentioned act of March 11th, 1867, defining who should be competent witnesses, the wife was not a competent witness, either for or against her husband, in any such action. For, in section 3 of the last mentioned act, it was provided that "All laws and parts of laws now in force and in conflict with the provisions of this act are hereby repealed." 2 R. S. 1876, p. 135.

We are of the opinion, therefore, that the court erred in admitting in evidence, over the appellants' objections, the testimony of Martha J. Porter, a witness for the appellees, and that for this error of law, occurring at the trial and excepted to, a new trial ought to have been granted.

We may properly remark, that, under section 275 of the civil code of 1881 (Acts of 1881, p. 289), it would seem that Martha J. Porter would now be a competent witness for the appellees in this case. R. S. 1881, p. 93, section 497; *Brown v. Norton*, 67 Ind. 424; *Hutchason v. The State*, 67 Ind. 449.

The judgment is reversed, at the appellees' costs, and the cause is remanded, with instructions to sustain the motion for a new trial and for further proceedings in accordance with this opinion.

No. 9899.

JENKINS v. THE STATE.

CRIMINAL LAW.—*Former Conviction.—Evidence.*—It is necessary for one who relies upon evidence of a former conviction to show that the offence for which he was convicted is the same as that involved in the prosecution in which the evidence is offered.

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136	107

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SAME.—*Transcript.*—*Omission of Warrant.*—*Evidence.*—*Assault and Battery.*—As a rule, the entire record of a cause should be offered in evidence, and not mere fragmentary parts thereof; but the omission of the warrant from the transcript of a judgment of conviction for an assault and battery, before a justice of the peace, where the entries show that both the defendant and injured person were present when the case was heard and determined, is immaterial.

SAME.—*Justice of the Peace.*—*Jurisdiction.*—*Statute Construed.*—Under section 1637, R. S. 1881, justices of the peace have jurisdiction to try and determine all cases of misdemeanors where the punishment may be by a fine only.

From the Shelby Circuit Court.

E. P. Ferris, W. W. Spencer and J. S. Ferris, for appellant.

D. P. Baldwin, Attorney General, W. W. Thornton, and J. L. White, Prosecuting Attorney, for the State.

ELLIOTT, C. J.—The appellant was tried and convicted upon an indictment charging him with an assault and battery.

The only questions which the record presents arise upon the ruling excluding the evidence offered in defence. The excluded evidence was the record of the trial and conviction of the appellant for an assault and battery. The trial was had before, and the judgment of conviction rendered by, a justice of the peace.

It is always necessary for one who relies upon evidence of a former judgment, to show that the offence for which he was convicted is the same as that involved in the prosecution in which the evidence is offered. This, we think, was done in the present instance. The evidence fairly shows that the offence for which the appellant was convicted by the justice is the same as that described in the indictment in the case at bar.

The general rule is, that the entire record of a cause should be offered in evidence, and that it is not proper to offer mere fragmentary parts of the record. We think all the material

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parts of the justice's record were offered. It is true the warrant is not in the transcript offered by the appellant, but as the justice's entry shows that both the appellant and Loudon, the injured person, were present when the case was heard and judgment pronounced by the justice, its omission was immaterial.

The objection, earnestly urged against the admission of the evidence, is that the justice of the peace had no jurisdiction to try the appellant. This question is decided against the appellee in the case of *The State v. Creek*, *post*, p. 139. We are satisfied that a just construction of the act of 1881 requires that it should be held that justices of the peace may exercise jurisdiction in cases of misdemeanors. Although there may be cases of the general class in which it would be proper to adjudge imprisonment as part of the punishment, the justice of the peace has no power to punish by imprisonment, nor to inflict a fine of more than twenty-five dollars. The reasoning in the case referred to very clearly shows that the Legislature did not intend to deprive justices of jurisdiction in that class of cases for which the punishment may be fine and imprisonment. This conclusion is strengthened by reference to former statutes and to our long existing practice. It has been the law since the organization of the State, that justices have jurisdiction in cases of misdemeanor, although there may be aggravated cases requiring that the accused be sent to a higher court in order to receive adequate punishment. This long settled rule should not be overturned, unless there are clear words requiring it.

Judgment reversed.

American Insurance Company v. McWhorter.

No. 6743.

AMERICAN INSURANCE COMPANY v. MCWHORTER.

CONTRACT.—*Signed without Reading.*—*Misrepresentation of Contents.*—The law affords no relief to one who, able to read, signs a contract without reading it, reposing a blind confidence in representations of another, whose interest is adverse, as to the contents of the instrument.

SAME.—*Pleading.*—*Insurance Note.*—A plea, setting up such misrepresentations as a defence to a note given for an insurance premium, is not made good by the averment that the company never delivered a policy to the defendant, and that he had never seen any policy of insurance issued to him.

SAME.—*Insurance.*—*Agreement by Agent to Issue Policy a Good Consideration.*—*Promissory Note.*—The agreement of an insurance company, through its agent, to issue a policy, is binding on the company, and is a sufficient consideration for a note given for a premium.

From the Marion Circuit Court.

V. Carter and W. H. Ripley, for appellant.

A. G. Porter and G. T. Porter, for appellee.

WOODS, J.—Action by the appellant against the appellee upon the following promissory note:

"\$44.00. For value received in Policy No. 121,504, dated the 8th day of April, 1873, issued by the American Insurance Company, of Chicago, Illinois, I promise to pay said company the sum of eleven dollars on the first day of April, 1874, and eleven dollars on the first day of April, 1875, and eleven dollars on the first day of April, 1876, and eleven dollars on the first day of April, 1877.

(Signed)

"WILLIAM MCWHORTER."

The appellee answered by a single paragraph, substantially as follows:

That the note was obtained by false representations of the plaintiff, relied on by the defendant, in this, to wit: On the 8th day of April, 1873, the plaintiff, by its agents, did solicit the defendant to insure in said company for five years, as the plaintiff had many times, by her agent, theretofore done; the

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136	458
78	136
136	678
78	136
141	61

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defendant refused to insure for said term, but after much solicitation did agree to insure for the period of one year, and for one year's insurance did then and there execute, in the usual and ordinary form, his promissory note for eleven dollars, dated April 8th, 1873, and payable July 1st, 1873; and the plaintiff did then and there, by her agent, who conducted the business, represent to the defendant that this was the only note or instrument for the payment of money required of him, and did further represent that the only other instrument by him signed was an application for a policy, which was to be forwarded to the company; that the plaintiff, *in the manner aforesaid*, did represent to the defendant that the application was for insurance for the term of one year; and that no other premium would be required of him than that charged for one year's insurance, to wit, eleven dollars; that the defendant was at the time engaged in the labor of whitewashing, and did not read the instrument by him signed, but relied entirely upon the representations and statements of the plaintiff's agent; that the one instrument which he signed was a promissory note for eleven dollars, and the other an application for a policy, and not an instrument promising to pay money; that the plaintiff well knew that the defendant was insuring for one year only, and had agreed to insure for that term only, and believed the representation that the instrument signed by him was an application for a policy of insurance, and not a promise or agreement to pay money.

That he paid the note dated April 8th, 1873, and payable July 1st, 1873, fully believing at the time that it was the only note or promise to pay money which the company held or claimed to hold against him; that the company never delivered to him a policy of insurance for one year, nor for any period, and he has never seen any policy of insurance issued in his name by said company.

The court overruled a demurrer for want of facts to this answer, and the appellant has saved an exception to the ruling.

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We are constrained to hold that the court erred in overruling the demurrer to the answer. *Seeright v. Fletcher*, 6 Blackf. 380; *May v. Johnson*, 3 Ind. 449; *Rogers v. Place*, 29 Ind. 577; *Nebeker v. Cutsinger*, 48 Ind. 436; *Dutton v. Clapper*, 53 Ind. 276; *Clodfelter v. Hulett*, 72 Ind. 137.

As was said in *Seeright v. Fletcher*, so it may be said here: "It does not appear that the defendant was deceived by the representations made to him, or if he was, it is manifest that it was the consequence of his own folly. If the defendant were an illiterate man, and the bond had been misread to him, he not being able to detect the imposition, the case would have been different. But it appears that he signed the bond without reading it himself, or hearing it read, and with all the means of knowing the truth in his power, reposed a blind confidence in representations not calculated to deceive a man of ordinary prudence and circumspection. In such a case the law affords no relief."

The averment that the company never delivered a policy of insurance to him, and that he has never seen any policy of insurance, issued to him by the company, does not make the answer good as a plea of no consideration. It does not deny that a policy was issued for his benefit, and the proof showed that it was left with his wife in the defendant's absence. Besides, the agreement of the company, through her agent, to issue the policy, was binding upon the company, and was a sufficient consideration for the note. *American, etc., Ins. Co. v. Patterson*, 28 Ind. 17; *Flanders on Insurance*, 130-135; *May on Ins.* 42; *Wood on Ins.* 10, *et passim*.

Judgment reversed, with costs.

ELLIOTT, C. J., did not participate in this decision.

The State v. Creek.

No. 9900.

THE STATE v. CREEK.

78	139
145	307

CRIMINAL LAW.—*Justice of the Peace.—Jurisdiction.—Statute Construed.*—

Under the provisions of the Revision of 1881, justices of the peace have jurisdiction in all cases of misdemeanors where a fine is the only punishment that *must* be inflicted, though imprisonment in the county jail might, but need not necessarily, be imposed.

From the Union Circuit Court.

D. P. Baldwin, Attorney General, *W. W. Thornton*, and *T. D. Evans*, for the State.

WORDEN, J.—The appellee was prosecuted before a justice of the peace of Union county, on a charge of malicious trespass, based on the following statutory provision :

“Whoever maliciously or mischievously injures or causes to be injured any property of another or any public property is guilty of a malicious trespass, and, upon conviction thereof, shall be fined not more than two-fold the value of the damage done, to which may be added imprisonment in the county jail for not more than twelve months.”
R. S. 1881, section 1955.

He was convicted before the justice, and fined in the sum of twenty-five dollars.

From the judgment of conviction he took an appeal to the circuit court. In the latter court the defendant moved to dismiss the cause for want of jurisdiction in the justice, and this motion was sustained and the cause dismissed. Exception by the State.

The State appeals to this court, and has assigned error upon the dismissal of the cause.

We have the following statutory provision as to the jurisdiction of justices in criminal cases :

“The jurisdiction of Justices of the Peace in criminal cases shall be co-extensive with their respective counties, and they shall have exclusive original jurisdiction in all cases where

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the fine assessed can not exceed three dollars, and concurrent jurisdiction with the Criminal Court and Circuit Court to try and determine all cases of misdemeanor punishable by fine only; and in trials before Justices, fines to the extent of twenty-five dollars, with costs, may be assessed; and they shall have jurisdiction to make examination in all cases; but they shall have no power to adjudge imprisonment as a part of their sentence, except in the manner especially provided in this act." R. S. 1881, section 1637.

It is thus seen that justices have concurrent jurisdiction "to try and determine all cases of misdemeanor punishable by fine only." The language thus used must be construed with the other provisions of the act, so as to carry out what appears to have been the intention of the Legislature. Taking into consideration other provisions of the act, we think it clear that the Legislature intended to vest jurisdiction in justices in all cases where a fine is the only punishment that *must be* inflicted, though imprisonment in the county jail might, but need not necessarily, be imposed. We might slightly change the language used, so as not to change its meaning, taken in connection with other provisions of the act, but so as to render the meaning more apparent, as follows: "To try and determine all cases of misdemeanor where the punishment *may be* a fine only."

There are many misdemeanors defined in the new revision of which the punishment *must be* imprisonment in the county jail as well as a fine. In these cases justices have no jurisdiction save as a mere examining court.

But there are other cases of misdemeanor punishable by fine, to which imprisonment in the county jail may, but need not necessarily, be added; cases where imprisonment is not a necessary part of the punishment. In the latter class of cases justices have jurisdiction; for in no other mode can the provisions of the statute be harmonized and the general purpose of the Legislature carried out.

An assault and battery is punishable by a fine, to which

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imprisonment in the county jail may be added. Section 1911.

But section 1638 expressly recognizes the jurisdiction of justices to try and determine such cases, and provides for having the injured party subpoenaed as a witness to attend the trial. This is utterly inconsistent with the idea that justices have no jurisdiction in cases where imprisonment in the county jail may, but need not necessarily be, added to the fine as part of the punishment. No inconvenience or failure of justice can grow out of the fact that justices of the peace are invested with jurisdiction in cases where imprisonment may or may not constitute a part of the punishment, for it is provided by section 1636, that if, in the opinion of the justice or jury trying the cause, the punishment which can be inflicted by the justice is inadequate to the offence, the justice shall commit or hold the prisoner to bail for his appearance before the proper court.

We are of opinion, for these reasons, that the justice had jurisdiction of the cause, and that the court below erred in dismissing it.

The judgment below dismissing the case is reversed, with costs, and cause remanded for further proceedings.

No. 7853.

CRAIG ET AL. v. ENCEY.

UNLAWFUL DETENTION OF LANDS.—*Appeal Bond.—Mesne Profits Pending Appeal.*—Under the statute concerning the unlawful detention of lands (2 R. S. 1876, p. 662), on an appeal by the defendant from the judgment of the circuit court to the Supreme Court, the appeal bond may be lawfully conditioned, that the defendant, among other things, will pay and satisfy all damages which the plaintiff may sustain, for mesne profits of the premises recovered, or for any waste committed thereon, as well before as during the pendency of such appeal.

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SAME.—Assignment of Bond.—Complaint.—An appeal bond is assignable by endorsement in writing, so as to give the assignee a right of action thereon, in his own name; and where the plaintiff, in an action on such bond, sues only for the recovery of the mesne profits of the premises, during the pendency of the appeal, his complaint will not be bad on demurrer thereto, for the want of sufficient facts, merely because it contains an admission of the payment of the previous judgment and costs.

SAME.—Practice.—New Trial.—Errors of law, occurring at the trial, must be specifically pointed out and assigned as causes for a new trial, in the motion therefor; for, if not so assigned, the Supreme Court will not consider such errors of law, nor decide any question thereby presented.

SAME.—Evidence.—Transcript of Judgment of Supreme Court.—In an action on an appeal bond, given on an appeal to the Supreme Court, a certified transcript of the judgment of that court is competent evidence.

From the Hendricks Circuit Court.

C. C. Nave, for appellants.

T. J. Cofer and *N. M. Taylor*, for appellee.

HOWK, J.—In this action the appellee, as the assignee of one Samuel T. Encey, sued the appellants on an appeal bond given by said Amelia Craig, on an appeal from a judgment rendered by the court below against her, and in favor of said Samuel T. Encey, to this court. The appellee's complaint contained two paragraphs, in each of which it was alleged, among other things, that said Amelia Craig had perfected and prosecuted her said appeal, and that the judgment appealed from had been in all things affirmed by the judgment of this court, which latter judgment still remained in full force and effect.

The bond in suit was executed by the appellants, Amelia Craig and Christian C. Nave, whereby they acknowledged themselves bound to said Samuel T. Encey in the penal sum of \$1,000. After reciting that said Samuel T. Encey had obtained a judgment against said Amelia Craig, in the Hendricks Circuit Court, at its March term, 1876, for \$44.50 and costs of suit, and also an order for the possession of certain rooms in the brick tavern, then occupied by said Amelia Craig, in the town of Danville, Hendricks county, Indiana, it was conditioned that the bond should be void, if the said Amelia

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Craig should duly prosecute her said appeal, and abide by and pay the judgment, costs and damages, which might be rendered or affirmed against her in this court, and should pay and satisfy all damages which might be sustained by said Samuel T. Encey for mesne profits of the premises recovered, or for any waste committed thereon, as well before as during the pendency of said appeal; otherwise to be in full force in law.

The cause was put at issue and tried by the court, and a finding was made for the appellee; and the appellants' motion for a new trial having been overruled, and their exception saved to this ruling, the court rendered judgment on its finding.

The appellants have here assigned, as errors, the following decisions of the circuit court:

1. In overruling their demurrer to each of the paragraphs of complaint; -

2. In sustaining appellee's demurrer to the first paragraph of the separate answer of said Amelia Craig;

3. In sustaining appellee's demurrer to the first paragraph of the separate answer of said Christian C. Nave;

4. In overruling appellants' motion for a new trial;

5. In overruling their motion to modify the judgment; and,

6. In admitting in evidence, on the trial, the opinion and judgment of this court, in the case of *Craig v. Ensey*.

The appellants' counsel earnestly insists that the court erred in overruling the separate demurrers to the first and second paragraphs of appellee's complaint. In discussing this supposed error, the first point made by counsel is, that each of the paragraphs of complaint was bad, for the reason that appellee admitted therein that the appellants had fully paid off the judgment appealed from, in the Hendricks Circuit Court, and all costs in this court. This point would have been well taken if the bond in suit had been given merely to secure the payment of the judgment which might be rendered or affirmed

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against said Amelia Craig by this court. But it will be seen from our statement of this case, that the bond was given to secure not only the payment of said judgment, but also to secure the payment of all damages which might be sustained by said Samuel T. Encey for mesne profits of the premises in controversy in that action, or for any waste committed thereon, as well before as during the pendency of said appeal. The provisions of the appeal bond in that case were expressly authorized by section 11 of "An act concerning the unlawful detention of lands and the recovery thereof," approved May 13th, 1852, in which section it was provided that, "On the trial of any cause under this act, either before the justice of the peace or on appeal, the damages for the detention of the premises shall be estimated up to the time of each trial, while damages on appeal by the defendant shall be deemed as covered by the appeal bond." 2 R.S. 1876, p. 664. *Jones v. Droneberger*, 23 Ind. 74. Under the bond in suit the appellants were liable for the mesne profits of the premises, during the pendency of the appeal, and that is all they were sued for in this action. The payment of the previous judgment and costs did not release or discharge the appellants from their liability, under the bond, for such mesne profits; and therefore the admission of the fact of such payment did not vitiate either paragraph of the complaint. *Craig v. Ensey*, 63 Ind. 140.

The appellants' counsel also claims that each paragraph of the complaint was bad, on the demurrer thereto, "because appellee had no right to maintain an action, founded on the appeal bond, executed by appellants to Samuel T. Encey, by virtue of his assignment of said bond to appellee." This position can not be maintained, we think, either upon principle or by authority. Samuel T. Encey was the obligee and payee of the appeal bond; and we know of no sufficient reason, and the learned counsel has not informed us of any, which would prevent the obligee and payee thereof from negotiating such bond by endorsement thereon, "so as to vest the property thereof" in his endorsee. Such an assignment of said

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bond would seem to be expressly authorized by the provisions of section 1 of "An act concerning promissory notes, bills of exchange, bonds or other instruments in writing," etc., approved March 11th, 1861. The assignment of the bond was in the words and figures following, to wit: "January 11th, 1879. For value received, I hereby assign the *within* bond, together with all rights and privileges growing out of the same, to William N. Encey.

(Signed)

"SAMUEL T. ENCEY."

The language used in this assignment shows very clearly, as it seems to us, that the bond was assigned by endorsement to the appellee. *Leedy v. Nash*, 67 Ind. 311. This was sufficient, and the assignor of the bond, Samuel T. Encey, was neither a proper nor necessary defendant to appellee's action. The assignor's property in the bond in suit, by virtue of the said assignment thereof, vested absolutely in the appellee, as such assignee; and it was not necessary to the validity of such assignment, that the judgment mentioned in the bond should also be assigned to the appellee.

The appellants' counsel also claims that the damages assessed were excessive. We are of the opinion, however, that the court did not err in its assessment of damages. It is admitted that the appellant Amelia Craig remained in possession of the premises for eight months after the rendition of the judgment appealed from, or until November 27th, 1876. and that, during that time, the fair rental value of said premises was \$30 per month. In assessing appellee's damages, the court allowed interest at the rate of six per cent. per annum on the aggregate sum of such rental value, for the period named, from November 27th, 1876, until the first day of April, 1879, the date of the finding and judgment in this action. This allowance of interest was right, we think, and the damages were not excessive.

The next point presented by the appellants' counsel, in his brief of this cause, is the alleged error of the court in per-

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mitting Newton M. Taylor, a witness for appellee, to testify that Amelia Craig stayed in the property without right, and without any contract with Samuel T. Encey. This evidence was objected to, "because of its incompetency and irrelevancy." This objection was not well taken, for the evidence, we think, was competent and relevant. Counsel also complains, in argument, of other evidence of the witness, Taylor; but, in their motion for a new trial, the appellants did not assign the admission of this other evidence as cause for such new trial, and therefore the supposed error of the trial court, in the admission of this other evidence, is not properly presented for our consideration. For there is no rule of practice better settled than this, that this court will not consider any supposed error of law, occurring at the trial, nor decide any question thereby presented, unless it appears that such error of law was assigned as a cause for new trial, in the motion therefor addressed to the trial court. *Leary v. Ebert*, 72 Ind. 418.

The last point made by appellants' counsel, in argument, is thus stated in his own language: "The court below most certainly committed a gross and unheard-of error, one unknown to the laws of Indiana and to all the civilized governments of the world, in suffering appellee to read, as evidence, to the court trying this cause, the opinion of the Supreme Court of Indiana in the case of *Amelia Craig v. Samuel T. Encey*, given in May, 1878. This may account for the excess of the damages assessed by the court below, under the evidence given on the trial of this cause." It seems to us that counsel has, perhaps, exaggerated the effect of the opinion of this court, in the case mentioned, on the trial court. But, whether this is so or not, we are clearly of the opinion that the certified transcript of the opinion and judgment of this court, in the case cited, was competent, material and relevant evidence on the trial of this cause, and that the court committed no error in admitting such transcript in evidence.

The other errors assigned by the appellants in this court

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have not been discussed by their counsel, in his brief of this cause. These supposed errors, even if they exist, must therefore, under the settled practice of this court, be regarded as waived.

We have found no available error in the record of this cause which would authorize this court to reverse the judgment of the trial court.

The judgment is affirmed, at the appellants' costs.

Petition for a rehearing overruled.

No. 8530.

BECKER v. DENMURE.

SUPREME COURT.—*Evidence.*—*Verdict.*—When there is evidence, which, if credited, justifies the verdict, though this evidence is contradicted, the Supreme Court will not weigh the evidence, nor disturb the verdict.

From the Dearborn Circuit Court.

W. S. Holman and *J. A. Parks*, for appellant.

H. D. McMullen and *D. T. Downey*, for appellee.

MORRIS, C.—This suit was commenced before a justice of the peace of Dearborn county, to recover for work and labor alleged to have been performed by the appellee for the appellant. The appellee recovered before the justice, and the appellant appealed to the circuit court.

In the circuit court the appellant filed an answer to the complaint in three paragraphs:

1st. The general denial;

2d. Payment;

3d. That, on the 11th day of December, 1878, the appellant promised to pay the appellee \$120 for the work specified in a written agreement filed with the answer; that the appel-

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lee, in pursuance of said written agreement, had partially performed the work therein mentioned; that said written agreement contains all the contract the appellant ever made with the appellee, and that the appellant has, on his part, performed said agreement.

The agreement is as follows:

"I, the undersigned, agree to pay W. F. Denmure the sum of \$120, for furnishing the labor for the decoration, or frescoring, of the following rooms at my private residence at Aurora, Ind., to wit: The two parlors and the dining-room; the ceilings shall be nicely decorated with test of flowers, leaves, scrolls, etc., and the walls shall be done in flat colors, with a drop border above and a rising border beneath, with a wainscoting, etc., as I may suggest; the hall shall likewise be laid out in panels and lines, corner pieces and such as I may call for. While respecting the harmony of colors and work, the decoration shall be done in the most workmanlike manner, subject to my order; and further, I agree to furnish all the materials for said work, and to pay to Mr. Denmure, at the end of each week, a small amount of money, according to my judgment, and the balance I will pay when the aforesaid work is completed.

F. W. BECKER, M. D."

The appellee replied to the second and third paragraphs of the answer by a general denial. To the third paragraph he also replied specially, alleging that, after the making of the contract therein stated, the quality, quantity and style of the work was, by the agreement of the parties, changed and altered; that a new and different contract was made between them, by which the appellant required the appellee to perform different work from that specified in the written contract, and promised to pay him for the same what it was worth.

The cause was submitted to a jury, who returned a verdict for the appellee.

The appellant moved the court for a new trial, for the reason that the verdict was contrary to law, and not supported

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by sufficient evidence, and because the damages assessed are excessive.

The error assigned is that the court below erred in overruling the motion for a new trial.

The appellee testified that he was a fresco painter; that he knew what the work was worth; that the work done by him for the appellant was worth from three to four dollars per day; that he worked for the appellant ninety-seven and three-fourths days; that the appellant had paid him, at different times, \$113, and that the balance was due and unpaid; that, at the first conversation he had with appellant in relation to the work, he proposed to make a sketch of the work to be done, and counted up what it would cost; that the cost of the work as proposed was \$120; that the appellant was unwilling to stand the expense of a sketch; that he then sketched off on the wall what was to be done for the \$120. The rooms to be decorated were two parlors and a dining-room, and certain work in the hall; that he worked off on the wall the particular style in which the rooms were to be finished. The decorations were to consist of test flowers, leaves and scroll-work; that, in order to have something to show for the money, he wrote out a memorandum of the work and gave it to the appellant to sign and return to him. He went to work December 11th, 1878. The appellant did not return the memorandum, but when the trouble began the appellee went to appellant and told him that he wanted the paper, as it was of no use to him. He refused to give it to the appellee, but gave him a copy of it. The appellee worked from December 11th until the 14th, in preparing the walls for the reception of colors, and then began to work off, according to the memorandum. In looking over some sketches for different styles of work, the appellant saw a particular sketch which he said he fancied more than the plan which had been agreed upon, and asked that it be adopted. The appellee told him that its adoption would require a change of the plan in order to secure harmony, and that it would be much

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more expensive. The appellant said he wanted the work done to suit him, and he would pay whatever it was worth. The appellee agreed to do the work as requested.

He further says, that he then sketched off the work according to the new plan, laying it out filled with double instead of single panels, and filling it with friezes instead of an empty panel along the border, and animal figures instead of scroll-work; that at each side of the room, according to the new plan, are places for human faces; these places were filled with selected human faces. On three several occasions, when told by the appellee that the work was costing more than the appellant expected, he promised to pay what it was worth. The work first agreed to be done would take forty-eight days; to do it on the new plan, as it was done, would require, and did take, ninety-seven and three-fourths days; there was more than twice the work on the new plan that there was on the first. As work was scarce, the appellee says he agreed to work for \$2.50 per day. After the rooms had been finished, without finding any fault, the appellant ordered the appellee to leave, which he did. It would have taken a week to finish the work.

The appellee further testifies as follows: "The defendant never signed and gave me the memorandum set up in the answer, and I only went to get it, or a copy of it, after he had ordered me off, in order to show what the first contract really was."

A Mr. Ferris, an artist who worked for the appellee, and assisted in doing the work for the appellant, testifies that the work was done according to the directions of the appellant, and in accordance with the memorandum. In many respects his testimony is irreconcilable with that of the appellee. The appellant testified, and his testimony contradicts that of the appellee upon almost every point. He says he might have told the appellee, that, if the work was satisfactorily done, he would pay something more than the \$120, but that he never

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agreed to do so, nor did he at any time assent to any alteration of the agreement.

It is very clear, that, upon the testimony of the appellee alone, the verdict and judgment of the court below were right. He testified that he did the work; that it was worth at least \$2.50 per day. He admits that he made a contract, not in writing, to do a certain amount of work for \$120, but swears that the contract was afterward changed, and that more than double the amount of work first proposed was done under the new contract; that the memorandum of the first contract prepared by him was never executed by the appellant. And, as to this, he is corroborated by the appellant, who admits that he detained the memorandum and never delivered it to the appellee. Had there been no other testimony than that of the appellee, the verdict must have been for him, and for the amount found by the jury.

On the other hand, had there been no other testimony than that offered by the appellant, the verdict should have been in his favor. But it was for the jury to pass upon the conflicting evidence. They believed the appellee. This court can not weigh the conflicting evidence, nor, in such case, disturb the verdict. There was evidence legally tending to support the verdict. *Ghormley v. Young*, 71 Ind. 62; *Toney v. Toney*, 73 Ind. 34.

The damages are not excessive. The appellee testifies that the work occupied ninety-seven and three-fourths days at \$2.50 per day; that he had been paid \$113. The balance exceeded the amount found by the jury.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

 Ricketts v. Harvey et al.

No. 8386.

RICKETTS v. HARVEY ET AL.

PROMISSORY NOTE.—Pleading.—Answer.—General Denial.—In an action upon promissory notes, an answer by the makers, that they had “executed” the notes, but had not delivered them, is sufficient, as such answer is equivalent to a general denial.

SAME.—Void Consideration.—An agreement by the payees of such notes, in consideration of their execution, to use their influence to secure the dismissal or favorable termination of a criminal prosecution, is void, and does not furnish a sufficient consideration for such notes.

SAME.—Given for Debt of Bankrupt.—An answer, that such notes had been given for the debt of A., who had been adjudged a bankrupt, of which the payees had notice, and that A. subsequently obtained his discharge in bankruptcy, is insufficient in bar of the action.

SAME.—Testimony of Surety as to Declarations of Principal.—It is error to allow a surety to testify to what his principal told him in the absence of the payees, at the time he signed the notes, for what purpose the notes were given.

From the Madison Circuit Court.

L. M. Conn and *H. D. Thompson*, for appellant.

J. W. Sansberry, *M. A. Chipman* and *J. W. Sansberry, Jr.*, for appellees.

BEST, C.—This action was brought by the appellant against the appellees, upon two notes made by them to him and one Hinton, on the 29th day of May, 1877, payable two and four months from date respectively, with interest, and without relief, etc.

The appellees filed an answer of five paragraphs:

The first answer was a general denial.

The second was a plea of no consideration.

The third admitted the execution of the notes, but averred that they were never delivered, and that the appellant had possession of them without right.

The fourth averred that there was a criminal prosecution pending in the Howard Circuit Court against one Miles Harvey, for obtaining money by false pretences from the payees of said notes; that the payees of said notes were the

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prosecuting witnesses in said prosecution, and that the only consideration for said notes was the agreement of said payees to use their influence to get said prosecution dismissed or favorably terminated.

The fifth averred that said notes were given for the debt of one Miles Harvey, who was indebted to the payees, and who then had a petition pending in bankruptcy; that the payees were notified of such proceedings, and said Harvey afterward obtained his discharge in bankruptcy.

The appellant filed separate demurrers to the third, fourth and fifth paragraphs of the answer, for the reason that neither of them stated facts sufficient to constitute a defence, but the demurrers were overruled and exceptions were reserved.

A reply was then filed; the issues were submitted to a jury, and a general verdict returned for the appellees. The appellant moved for a new trial, which was overruled, and a judgment was rendered upon the verdict.

From this judgment the appellant appeals, and, by the proper assignments of error, insists that the court erred in overruling the demurrers to the third, fourth and fifth paragraphs of the answer, and in overruling his motion for a new trial.

The third paragraph of the answer averred that the notes were executed, but not delivered, and it is insisted that this was not a sufficient answer. We think otherwise. The word "executed" implies a delivery, but as it is expressly averred that the notes were not delivered, we think the word "executed," as used, was synonymous with the word "signed," and that the paragraph, fairly construed, means that the notes were signed, but not delivered. The paragraph attempted to deny the execution of the notes, but, as it was not verified, it was insufficient for such purpose. It, however, denied the delivery of the notes and was equivalent to a general denial.

The demurrer was properly overruled.

It is insisted that the fourth paragraph of the answer is not good because the mere agreement of the payees to use their

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influence to secure a favorable termination of the criminal prosecution was not illegal. This position can not be maintained. It is the duty of every person to exercise his influence in favor of the due enforcement of the criminal laws of the State, and no agreement to withhold such influence, or to employ it in such manner as to affect such prosecution, will be enforced. The law exacts from every one the obligation to aid in the due administration of justice by the proper exercise of his influence, and every agreement whereby such person's influence is secured, controlled, neutralized or in any way affected, is a fraud upon the law, and is void as being against public policy. In this case the payees of the notes were the prosecuting witnesses, and the persons from whom Harvey obtained the money. Their relation to the prosecution was, in a certain sense, adverse to Harvey. The agreement did not create the relation of attorney and client, but imposed upon the payees the obligation to otherwise aid Harvey in escaping punishment in such prosecution. They were to use their influence to secure a favorable termination of the prosecution. This imposed upon them some obligation. This was to do something for Harvey, or nothing against him. The proper exercise of their influence was due Harvey without compensation, and the proper exercise of such influence, though beneficial to Harvey, would not have been prejudicial to the public. The engagement, however, imposed a greater obligation, and the promised compensation would naturally prompt them to aid Harvey in defeating such prosecution. The desire to discharge such obligation, stimulated by such compensation, would suggest the employment of illegitimate means and result in embarrassing, if not defeating, such prosecution. This the law will not sanction by enforcing such contracts. 1 Parsons on Contracts, 440; *Gray v. Hook*, 4 N. Y. 449.

We think the facts averred constituted a bar to the action.

The fifth paragraph of the answer was insufficient, and the demurrer should have been sustained. The discharge of

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Miles Harvey from the payment of his debts in no manner relieved the appellees from the payment of theirs, and this fact constituted no defence.

This brings us to the motion for a new trial.

Among the various reasons embraced in the motion, it was insisted that the court erred in admitting, and in refusing to strike out, the testimony of one A. Ellis, as to the consideration of the notes, since it appeared that he knew nothing about it other than what Joel R. Harvey, the principal maker of the notes, told him when he requested him (Ellis) to sign the notes.

It appeared from the evidence that Joel R. Harvey was the principal in said notes, and that Ellis was one of his sureties. Ellis was called by the defendants, and this question was propounded to him: "State to the jury what the consideration of these notes was." He answered: "Those notes were presented to me for my signature by Joel R. Harvey, and I signed with the understanding—"

At this point the appellant objected, and inquired of the witness whether either of the payees was present? The witness answered, "No, sir;" and appellant objected to witness stating any conversation that occurred between the witness and Harvey; but the court overruled the objection, and the witness answered: "I signed those notes for the purpose of securing the release of this man, Miles Harvey, that was under indictment at that time. * * That was all the conversation I had any knowledge of whatever." Upon cross-examination the witness stated that he had had no conversation with any one, except Joel R. Harvey, about the notes; whereupon the appellant moved the court to strike out his testimony as to the consideration of the notes. Thereupon the court inquired of the witness what, if anything, he personally knew about the consideration of the notes. He answered: "I don't know that I know anything about it, except as far as I knew this prosecution was going against Miles Harvey; that he had been convicted at a certain term

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of court; that was a matter that was known by every person out there."

The court further enquired: "That was the understanding between you and Harvey as you got it from Harvey?" Answer: "Yes, sir." "You had no understanding or conversation with the plaintiffs, nor actually knew nothing only as you inferred it from the circumstances?" "That was all; yes, sir."

Upon these answers the court refused to strike out the testimony. This was error. The witness signed the notes as the surety of Harvey, and the consideration that moved from the payees to Harvey supported the notes. Harvey's statements to the witness were not competent because they were hearsay, and the substance of the statements of Harvey was as incompetent as the statements themselves. Nor could the witness infer a fact from the circumstances and state that inference to the jury. If facts are thus to be established, the jury, and not the witness, must infer the facts from the circumstances.

The appellees claim that if this ruling was wrong it was harmless, as the other evidence abundantly established the vicious consideration of the notes.

In this position we do not concur. The appellant offered testimony tending to show that they had furnished Miles Harvey \$300 in money; that the notes in suit were given in satisfaction of their claim against him, and that such claim was the only consideration of said notes. The testimony of the appellees tended to show that the consideration of the notes was as stated by Ellis, and, as between these versions of the transaction, the testimony of Ellis may have had a controlling influence. If it had any, it injured appellant upon this disputed question of fact. We can not say that it did not, and therefore think the court erred in admitting and in refusing to strike it out. For these errors the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things, reversed, at the costs of the appellees.

 Baddeley v. Patterson.

No. 8536.

BADDELEY v. PATTERSON.

PLEADING.—Complaint.—Demurrer.—If a complaint contain several paragraphs, some founded on contract, and some on tort, some good and some bad, there is no available error, under the code, in overruling a demurrer to the entire complaint, assigning for causes a want of sufficient facts and a misjoinder of causes of action.

SAME.—Arrest of Judgment.—When a complaint contains several paragraphs, one only being good, a motion in arrest of judgment should be overruled.

JUDGMENT.—Improper Relief.—Supreme Court.—When the plaintiff is entitled to a judgment, but the judgment rendered gives relief to which he is not entitled, and no objection to the form thereof was made below, there is no remedy in the Supreme Court.

From the Hendricks Circuit Court.

C. C. Nave, for appellant.

BICKNELL, C. C.—Patterson paid for Baddeley \$50, and signed a note for him as surety, payable to Hamrick, for \$200, and Baddeley verbally agreed to give him a mortgage, with a condition in it that if the note should not be paid, or if Baddeley should undertake to sell or remove the property, then Patterson might take possession of the property as his own; it was all personal property, chiefly household furniture. Baddeley would not give the mortgage, and refused to pay the note, and Patterson had to pay it, and then Baddeley would neither reimburse Patterson nor give him the mortgage. Patterson brought this suit against Baddeley. The complaint embraced several causes of actions, to wit: For \$50, money paid, laid out and expended; for the money paid as surety; a claim in replevin, supported by an affidavit that Patterson was entitled to the possession of the property, although the mortgage had never been executed; a demand that the court would decree specific performance of the agreement to give the mortgage; and, finally, a demand for foreclosure of the mortgage, the plaintiff annexing to his complaint the

78	157
127	529
78	157
140	577
78	157
153	598

78	157
169	576

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blank form of a mortgage, which he averred was the kind of mortgage that the defendant had agreed to give.

Upon this complaint a writ of replevin was issued, by virtue of which the sheriff took the property and delivered it to the plaintiff.

The defendant demurred to the complaint for two causes, to wit:

1st. For want of facts sufficient to constitute a cause of action;

2d. For improper joinder of several causes of action.

The demurrer was overruled, and the defendant answered in two paragraphs, to wit:

1st. The general denial;

2d. That the defendant owns the property and is entitled to the possession of it, and that the plaintiff holds it wrongfully; wherefore defendant prays for a return of the goods and \$100 for the detention thereof, and that, in default of such return, he may have judgment for the value thereof, \$400.

The record does not show any reply filed to the second paragraph of answer.

The cause was tried by the court, there was a finding for the plaintiff, the defendant's motion in arrest of judgment was overruled, and a judgment was rendered in favor of plaintiff for \$253.30 on account of the payment of the Hamrick note, and that the plaintiff was entitled to the possession of the property, and to the foreclosure of the promised mortgage that had never been executed.

From this judgment the defendant appealed. He assigns the following errors, to wit:

1st. The court erred in overruling the demurrer to the complaint.

2d. The court erred in overruling the motion in arrest of judgment.

The complaint was insufficient in replevin, because the facts alleged show that the plaintiff was not entitled to the possession of the goods, and that there was no unlawful detainer

Baddeley v. Patterson.

by the defendant. The remedy for the breach of a contract to make a mortgage on household furniture is not replevin. A specific performance could not be lawfully decreed of such a contract, and the foreclosure of a mortgage of such property, when the mortgage had no existence, is without precedent.

The complaint, however, contained a good cause of action for the money paid, and therefore there was no error in overruling the demurrer to the entire complaint. *Bennett v. Preston*, 17 Ind. 291; *Owens v. Lewis*, 46 Ind. 488; *Bayless v. Glenn*, 72 Ind. 5.

There were several causes of action improperly united in the complaint, but error in the ruling upon a demurrer for that cause will not authorize the reversal of the judgment. Practice Act, section 52. The proper remedy would have been a motion to separate the causes of action or to strike out all the causes of action except the claim for the money paid. *Bayless v. Glenn*, *supra*; *Lane v. The State*, 27 Ind. 108. As to the motion in arrest of judgment, there was no error in overruling that motion, because the plaintiff was entitled to judgment upon the claim for money paid. If the defendant was not satisfied with the form of the judgment, his remedy was a motion to correct or modify it. *Higgins v. Kendall*, 73 Ind. 522; Buskirk's Practice, 268. No such motion was made. There is no error in the record, of which the defendant can now take advantage. The judgment of the court below must be affirmed.

PER CURIAM.—It is therefore ordered by the court, upon the foregoing opinion, that the judgment of the court below be, and it is hereby, in all things affirmed, at the costs of the appellant.

Borroughs v. Adams *et al.*

No. 7464.

BORROUGHS v. ADAMS ET AL.

DESCENT.—*Illegitimate Child.*—*Heir.*—*Statute Construed.*—Under the provisions of the act of February 10th, 1853, 1 R. S. 1876, p. 410, the brothers and sisters of an intestate take his estate, as heirs, to the exclusion of his illegitimate child.

From the Randolph Circuit Court.

M. Hunt, E. L. Watson and W. E. Monks, for appellant.

L. J. Monks and W. A. Thompson, for appellees.

FRANKLIN, C.—This was a proceeding by an illegitimate child for the partition of the lands of its putative father. The suit was commenced in the name of Franklin L. Borroughs (the child), by his next friend, Fairfax Hunt, against Elijah Adams and Cornelius Metsker, who were the purchasers of the land from the brothers and sisters of the putative father, after his death.

The complaint alleges that the father died intestate, the owner in fee and possessed of the undivided interest in the lands, as described in the complaint; that he died single, leaving no children but appellant, but left brothers and sisters residing in this State; that during his lifetime he acknowledged appellant to be his child.

A demurrer was filed to the complaint, and the cause comes here upon the ruling of the court in sustaining the demurrer.

This complaint is based upon the act of February 10th, 1853, 1 R. S. 1876, p. 410, which reads as follows: "That the real and personal estate of any man dying intestate without heirs resident in any of the United States at the time of his death or legitimate children capable of inheriting without the United States shall descend to and be vested in his illegitimate child or children who are residents of this State or any of the United States, and such illegitimate child or children shall be deemed and taken to be the heir or heirs of such

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intestate in the same manner and entitled to take by descent or distribution to the same effect and extent as if such child or children had been legitimate: *Provided*, that the intestate shall have acknowledged such child or children as his own during his lifetime; and *provided further*, that the testimony of the mother of such child or children shall in no case be sufficient to establish the fact of such acknowledgment."

It is insisted by appellant that the word "heirs" in the foregoing statute means child or children, and does not include brothers and sisters. The general meaning of the word "heir" is one upon whom the law casts the estate upon the death of his ancestor. Bouv. Law Dict. It may be limited by the context to mean a child of the body of the ancestor only. *Jones v. Miller*, 13 Ind. 337. The words "my heirs" mean next of kin. *Rusing v. Rusing*, 25 Ind. 63.

All who may inherit under our laws may be heirs. And the foregoing statute provides a contingency in which an illegitimate child may inherit the estate of its putative father, and thereby become his heir. But the question arises, Do the facts of the case at bar bring about the contingency in which appellant can be the heir? This statute provides that an illegitimate child can only inherit where there is no legitimate child or children in the United States or elsewhere, and no heirs in the United States. Were it not for this act, who would inherit? It was intended by the Legislature, should the remote contingency occur, to give the estate to the illegitimate child in preference to its escheating to the State. But where there were legitimate heirs, lineal or collateral, within the United States, the estate would not escheat to the State.

At the time of the passage of this act, brothers and sisters, under the law, could inherit and were collateral heirs. And it certainly could not have been the intention of the Legislature, nor will the language of the act bear the construction, that the brothers and sisters were to be cut off and the estate given to an illegitimate child.

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We think the court did not err in sustaining the demurrer to the complaint.

PER CURIAM.—It is therefore ordered upon the foregoing opinion, that the judgment below be, and it is hereby, in all things affirmed, at appellant's costs.

78 186
188 148

No. 9552.

HACKLEMAN v. THE BOARD OF COMMISSIONERS OF HENRY
COUNTY.

CONTRACT.—*Construction.—Unimportant Parts Suppressed.—County Bounties to Soldiers for Particular Regiment.—Enlistment Under Offer and Service in Another Regiment.*—It is a rule of construction that a contract should be upheld rather than defeated. Force and validity will be given to all its parts and terms, if possible, but comparatively unimportant parts will be disregarded, if in that way only the contract can be sustained, especially where the party seeking relief has performed the service required of him, and in the manner required, except in unimportant particulars, which, without his fault, were put beyond his control. A county, authorized thereto by law, offered bounties for the enlistment and service of soldiers in the 69th regiment Indiana volunteers. A. accepted the offer and enlisted for that regiment, but afterwards, without his consent, was mustered into and served in the 84th regiment.

Held, that he was entitled to the bounty.

From the Henry Circuit Court.

M. E. Forkner and J. M. Morris, for appellant.

J. H. Mellett and E. H. Bundy, for appellee.

WOODS, J.—The appellant presented to the Board of Commissioners of Henry County his petition for an allowance, alleging, in substance, the following facts: That on the 22d day of July, A. D. 1862, the Board of Commissioners of said county made, and caused to be spread of record, the following order, to wit: "Whereas, according to an act approved May

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11th, 1861, the board of commissioners of the several counties of the State are authorized to appropriate," etc., "and to make such appropriations for the purchase of arms and equipments and for the raising and maintaining of military companies within their respective jurisdictions, either for home defence or for the service of this State or of the United States, and to make such regulations as they may think right and proper in the distribution of said appropriation; and whereas the exigencies of the times require that two companies of volunteers be immediately raised in Henry county for the service of the United States in the 69th regiment of Indiana volunteers: Therefore it is ordered that there be appropriated from the county treasury to each private who may volunteer from Henry county in either of said companies the sum of eight dollars and thirty-three cents per month, for and during the time he remains in the service of the United States as a private or non-commissioned officer in said 69th regiment, for any time not exceeding three years. It is also ordered that the sum of eight dollars and thirty-three cents per month be appropriated on condition as above to any number not exceeding fifteen who may volunteer in the artillery company to be formed immediately in eastern Indiana; that said several appropriations shall be paid at the end of each month from the time said regiment or company is mustered into service, on the warrant of the auditor," etc. "In order that the foregoing order may be carried out, it is required of each of the captains of said companies or the artillery company to certify to the county auditor the names of the privates and non-commissioned officers of the respective companies, and the date when the regiment or artillery company was mustered," etc. "It is further required of the captains of said companies to certify to the auditor any death, discharge, or promotion to a commissioned office." Signed by the members of the board.

In pursuance of this order, and expecting to receive the benefit of it, the appellant, who was a resident of said county,

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on the 25th day of July, 1862, volunteered and enlisted in the service of the United States as a private soldier, to be mustered into said service as a member of the 69th regiment, and this he did, before two companies had enlisted from said county for said regiment or for any other service in the U. S. army, after the making of said order. He enlisted for three years or during the war, was credited to said county, and to the number of one supplied the quota of the county. Immediately upon his enlistment, he was sworn into the military service of the United States, and thereupon removed to Camp Wayne, at Richmond, Indiana, where, being under military authority and control, he was, on the 3d day of September, 1862, without his consent, mustered into the service of company "F," and assigned to the 84th regiment of Indiana volunteer infantry, being at the time informed by said authorities that the 69th regiment was then full by volunteers from other counties. He fully complied with said order, so far as he could, and, having served as a private soldier for three years and a month, was honorably discharged on the 14th day of September, 1865. In further compliance with the order, he procured the certificate of his captain to the auditor, showing the date of his muster into the service. Wherefore, etc.

The attorney of the appellee filed a demurrer for want of facts to this petition, which is called a complaint. The board sustained the demurrer, and dismissed or refused to allow the claim. Appeal was taken to the circuit court, which also sustained the demurrer, and gave judgment for the appellee. The appellant saved an exception, and has assigned error on the ruling.

We have no brief from the appellee, but, by the brief of the appellant, are informed that the ruling of the court was based on the ground that the appellant had not shown a compliance with the contract on his part, in that he did not serve in the 69th regiment. There is no other respect in which it has been suggested, or has occurred to us, that the statement of the claim can be deemed defective or insufficient. Under

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the law referred to, the board was authorized to offer the proffered bounty, and the appellant, having accepted the offer, and having volunteered and enlisted, with the intention of serving in the regiment designated, is entitled to the stipulated bounty for the time which he served, unless the fact that he was mustered into another regiment, against his own consent, and by an authority over which he had no control, and which, indeed, he was bound to obey, must be held to defeat his right. We do not think the contract should be so interpreted. It is a familiar rule of construction, that the contract should be supported rather than defeated. "Where there is room for it, the court will give a rational and equitable interpretation, which, though neither necessary nor obvious, has the advantage of being just and legal, and supposes a lawful contract which the parties may fairly be regarded as having made. So, for the same reason, all the parts of the contract will be construed in such a way as to give force and validity to all of them, and to all of the language used, where that is possible. And even parts or provisions which are comparatively unimportant, and may be severed from the contract without impairing its effect or changing its character, will be suppressed as it were, if in that way, and only in that way, the contract can be sustained and enforced." 2 Parsons Contracts, 505.

It is evident that the main purpose of the board of commissioners, in proffering the bounties mentioned in their order, was to procure the enlistment from that county, and to its credit, of soldiers in the national service; and it is not to be believed that it was designed that the soldier, who should be thereby induced to enlist, should not have the benefit of the bounty, unless he served in a particular regiment, when his failure so to serve resulted from causes beyond his own control. From the time of his enlistment, the status of the appellant, as a soldier, was irrevocably fixed, and the averment of his complaint being that his assignment to the 84th regiment was made without his consent, we hold that he can not for that

The State v. Sparks.

cause be denied the right to claim the proposed bounties. The substantial benefits contemplated by the board were accomplished by his enlistment and actual service in the army; and the involuntary failure to perform a condition comparatively unimportant can not be permitted to deprive the appellant of the entire benefit and consideration of the contract on his part.

It is insisted that, if the appellant enlisted in or for the 69th regiment, the military authorities had no authority to assign him to another regiment without his consent. Whether the officers had such authority is a question of law, the decision of which either way can not affect the averment, admitted by the demurrer to be true, that the assignment was made, as alleged, without the appellant's consent.

The judgment is reversed, with costs and with instructions to overrule the demurrer.

Opinion filed at May term, 1881.

Petition for a rehearing overruled at November term, 1881.

No. 9734.

THE STATE v. SPARKS.

CRIMINAL LAW.—*Suffering Escape of Prisoner.—Indictment.—Warrant.*—

Where an officer, whose duty it is to have the custody of a prisoner charged with or convicted of an offence against a law of this State, negligently suffers such prisoner to escape out of his custody, the offence of such officer is a misdemeanor, punishable by fine only. But the inapt use of the adverb "feloniously," in the description of the offence, furnishes no ground for quashing the indictment; nor was it necessary to the sufficiency of the indictment that it should charge that the officer had the prisoner in his custody by virtue of a sufficient warrant, or that it should set out a copy of the warrant.

From the Jackson Circuit Court.

The State v. Sparks.

D. P. Baldwin, Attorney General, *F. L. Prow*, Prosecuting Attorney, and *W. W. Thornton*, for the State.

J. H. Nixon, for appellee.

Howk, J.—The only question for the decision of this court in this case is this: Did the circuit court err in sustaining the appellee's motion to quash the indictment herein? Omitting merely formal and introductory matters, the indictment charged in substance, "that George Sparks, on the first day of April, 1881, at said county and State aforesaid, said George Sparks being then and there a constable in and for Carr township, in said county and State aforesaid, and an officer whose duty it was to have the custody of prisoners charged with or convicted of any offence against any law of the said State of Indiana, and, as such constable, then and there having one Virgil Wilson a prisoner in his, the said George Sparks' custody, for the offence of riot, before conviction therefor, with which said offence the said Virgil Wilson was then and there charged, and which said charge of riot against said Virgil Wilson being then and there pending and coming on for trial before Noah S. Weddle, a justice of the peace in and for Carr township, in said county and State aforesaid, did then and there feloniously, unlawfully, corruptly and negligently suffer and permit the said Virgil Wilson then and there to escape out of his, the said George Sparks' custody, and to go at large, contrary to the form of the statute," etc.

It is manifest, from the language of this indictment, that it was intended therein and thereby to charge the appellee, George Sparks, with the commission of the misdemeanor which is defined, and its punishment prescribed, in section 43 of the misdemeanor act of June 14th, 1852. This section 43 reads as follows:

"Sec. 43. If any officer, whose duty it may be to have the custody of prisoners, charged with or convicted of any offence against any law of this State, shall negligently suffer any such prisoner to escape out of his custody, he shall be fined not exceeding \$10,000." 2 R. S. 1876, p. 474.

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We have no brief from the appellee or his counsel, in this court; and the attorneys of the State have not, in their brief of this cause, indicated the grounds upon which the circuit court quashed the indictment. In drafting the indictment, the prosecuting attorney has used the adverb "feloniously," as qualifying the acts done by the appellee, which constitute the offence intended to be charged. This adverb is properly used in describing felonies, but it is inaptly used in describing an offence which the law of this State declares to be a misdemeanor, and nothing more. But the improper use of this adverb, in the indictment in this case, was at most mere surplusage, and would furnish no sufficient ground for quashing the indictment.

We can conceive of no cause or reason which may have induced the circuit court to quash the indictment, unless it be that it failed to charge that the appellee, as constable, had the prisoner named in his custody by virtue of a sufficient warrant, and to set out the warrant. Such a charge would have been proper enough if the facts had warranted it; but the omission of this charge will afford no sufficient ground for quashing the indictment. The courts of this State must know, and take notice thereof without an averment, that under the law a riot is a public offence, of which a justice of the peace may have jurisdiction, and that a constable may lawfully have the custody, even without a warrant, of a prisoner charged with this offence. The indictment now under consideration, the substance of which we have given, is a substantial copy of the form of an indictment, in such case, as given in Archbold *Crim. Pl. & Ev.*, 10th Lond. ed., 550, 551, in 2 Bishop *Crim. Procedure*, section 941, and in Moore's *Crim. Law, Indiana*, p. 758, section 717.

We are of the opinion, for the reasons given, that the circuit court erred in quashing the indictment.

The judgment is reversed, at the appellee's costs, and the cause is remanded with instructions to overrule the motion to quash the indictment, and for further proceedings.

Rogers v. The Western Union Telegraph Company.

No. 8663.

ROGERS v. THE WESTERN UNION TELEGRAPH COMPANY.

TELEGRAPH COMPANY.—*Contract to Transmit and Deliver Dispatch on Sunday.*—*Penalty.*—The statutory penalty given by "An act to regulate electric telegraph companies," 1 R. S. 1876, p. 868, can not be recovered by a person who has delivered his dispatch for transmission and delivery on Sunday.

SAME.—*Void Contract.*—*Ratification.*—A contract for transmitting a telegraphic dispatch, made on Sunday, is void, and the retention of the dispatch and of the consideration paid by the sender does not constitute a ratification.

SAME.—*Work of Necessity.*—A dispatch, "Come up in morning; bring all," can not be regarded as a work of necessity, within the meaning of the statute for the protection of the Sabbath; nor is telegraphing of itself a work of necessity.

PENALTY.—*Illegal Contract.*—A penalty can not be recovered for the failure to perform an illegal contract.

From the Knox Circuit Court.

H. Burns, for appellant.

C. G. McCord, for appellee.

ELLIOTT, C. J.—This action was instituted by the appellant to recover the statutory penalty of one hundred dollars for the failure to transmit and deliver a telegraphic message.

The defence is, that the message was placed in the hands of the appellee on Sunday, and the contract for its transmission made on that day. The theory of the appellee and of the trial court is, that, as the contract for transmitting the message was made on Sunday, it is void, and no penalty can be recovered for the failure to perform a void contract.

Appellant vigorously attacks the decisions holding that contracts made on the first day of the week, commonly called Sunday, are incapable of enforcement. The rule pronounced in these cases has long been the law of this State. There are very many cases enforcing this rule. *Reynolds v. Stevenson*, 4 Ind. 619; *Banks v. Werts*, 13 Ind. 203; *Love v. Wells*, 25 Ind. 503; *Davis v. Barger*, 57 Ind. 54; *Gilbert v. Vachon*, 69 Ind. 372; *Parker v. Pitts*, 73 Ind. 597; *Mueller v. The State*,

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125	134
78	169
152	660

78	169
160	3

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76 Ind. 310. Some of them have carried the doctrine very far, possibly too far. In *Link v. Clemmens*, 7 Blackf. 480, it was held that a replevin bond executed on Sunday was invalid; and, in *Catlett v. The Trustees, etc.*, 62 Ind. 365, the court decided that a subscription to a church made on Sunday was void. No rule is more firmly settled than the one under mention, and we can not now depart from it.

A penalty can not be recovered for the failure to perform an illegal contract. The statute does not apply to contracts which are without legal force. The evident intention of the Legislature was to secure the performance of such contracts as imposed binding obligations upon the telegraph companies. The statute is a highly penal one, and we can not extend its operation by a liberal construction. *Western Union Telegraph Co. v. Artell*, 69 Ind. 199. We certainly can not bring within its provisions a case, such as the present, where there is, in legal effect, no contract at all.

Courts can not declare, as matter of law, that the business of telegraphy is a work of necessity. There are, doubtless, many cases in which the sending and delivery of a message would be a work of necessity within the meaning of our statute. But we can not judicially declare that all contracts for the transmission of telegraphic messages are to be deemed within the statutory exception. Whether the contract is within the exception must be determined, as a question of fact, from the evidence in each particular case.

We can not adjudge that the message which the appellee agreed to transmit is one which comes within the statute permitting the performance of works of necessity. It reads thus: "Come up in morning; bring all." These words are to be taken in their ordinary meaning, for there is nothing ascribing to them any other or different signification. Upon their face they imply a friendly invitation to visit the sender. Such a message can not be regarded as a "work of necessity," within the meaning of our statute.

The contract for the transmission of the message having

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been made on Sunday, and the message not being one which can be treated as entitling it to be transmitted as "a work of necessity," the contract for its transmission must be adjudged incapable of enforcement. As the appellee violated no valid contract, there is no foundation for the claim to the penalty prescribed by statute.

So far, our consideration has been confined to the questions presented upon the first paragraph of the complaint and the answer thereto; we turn now to the questions presented upon the second paragraph of the complaint. This paragraph alleges the undertaking to transmit the message to have been entered into on the 5th day of October, 1879; that the message was telegraphed to Vincennes on that day; that the person to whom it was addressed enquired, at the proper office, for the message on the 6th day of that month, but that it was not delivered to him until the following day.

The appellant maintains that the defence that the contract for the transmission of the message was made on Sunday is not a sufficient answer to this paragraph. We can not assent to this view. The right to recover the statutory penalty depends upon the validity of the contract under which the message was received. Unless there is such a contract as imposed a binding obligation upon the telegraph company, there is no right to inflict punishment, for no legal duty has been violated. A violation of a legal duty is essential to a right of action for the recovery of the penalty. The retention of the message and of the consideration paid for its sending did not create a new contract. The only contract was that made on Sunday. What was afterward done did not constitute a new and different agreement.

The action, it must be borne in mind, is not one for the recovery of damages for a breach of contract. Nor is it a case for the redress of injuries arising from a tort. It is a civil action for the recovery of a penalty prescribed by statute, not for the purpose of making good any loss that the sender of the message may have sustained, but for the purpose of pun-

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ishing a telegraph company for the negligent failure to transmit a message which it, by a valid contract, undertook to transmit. We can, therefore, derive no assistance from the cases which hold that, for a tort committed on Sunday by common carriers, or, for the matter of that, by anybody else, an action will lie.

It is settled that the retention of what has been received under a contract entered into on Sunday will not of itself be a ratification. *Perkins v. Jones*, 26 Ind. 499. If the retention of the consideration can not be regarded as constituting a ratification in cases where the relief sought is an enforcement of the right given by the contract, it certainly can not be so regarded where the object of the action is the recovery of a statutory penalty. It may well be doubted whether anything short of an independent contract can, in such a case, create such a new duty as will supply sufficient foundation for an action to recover the penalty which the statute has affixed, by way of punishment, for a breach of duty.

Judgment affirmed.

 No. 9857.

MOUNTJOY v. THE STATE.

78	172
155	390
155	418

CRIMINAL LAW.—*Larceny*.—*Affidavit*.—*Indictment*.—Where, upon the face of an affidavit or indictment, the property alleged to have been stolen appears to have been personal, the failure to aver that the property was personal affords no ground of objection to the affidavit or indictment. SAME.—*Presumption*.—*Clerk*.—*Signature*.—Courts take judicial notice of the names and signatures of their officers, and where the word "clerk" is added to the signature attached to the jurat of an affidavit in a criminal prosecution in the circuit court, it will be presumed to be the signature of the clerk of that court.

SAME.—*Seal*.—*Jurat*.—The seal of a court need not be attached to the jurat of an affidavit sworn to before its clerk, and to be used only in such court.

Mountjoy v. The State.

PRACTICE.—*New Trial.—Record.*—Affidavits in support of a motion for a new trial do not become parts of the record by being merely copied into the record as a part of the motion for a new trial.

SAME.—*Judgment.—Supreme Court.*—As a rule, in criminal as well as in civil cases, a party present in court when a judgment is rendered against him, and failing to object thereto, can not complain of it in the Supreme Court.

From the Hamilton Circuit Court.

W. Garver and *R. Graham*, for appellant.

D. P. Baldwin, Attorney General, *W. W. Thornton* and *W. A. Kittinger*, Prosecuting Attorney, for the State.

NIBLACK, J.—This was a prosecution for petit larceny against James Mountjoy, the appellant, founded upon affidavit and information.

A motion to quash the affidavit and information being first overruled, a trial by a jury resulted in a verdict finding the appellant guilty as charged, and fixing his punishment at one year's imprisonment in the State's prison, a fine of one dollar, and disfranchisement for two years.

After overruling motions for a new trial, and in arrest of judgment, the court rendered judgment in accordance with the verdict, also adding that the appellant should be incapable of holding any office of trust or profit for the period of two years.

Error is assigned upon the overruling of the motion to quash the affidavit and information, upon the refusal of the court to grant a new trial, upon the denial of the motion in arrest of judgment, and upon the judgment rendered upon the verdict.

The affidavit charged the appellant with having stolen some gold coin, some paper money and some silver coin, of the aggregate value of \$12.50, "the property of William A. Fisher and Judge Calbert," and the jurat was signed simply "J. R. Christian, Clerk."

The first objection urged to the affidavit is, that it did not aver the money stolen to have been the *personal* property of Fisher and Calbert. This objection can not be sustained.

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Where, upon the face of the affidavit or indictment, the property alleged to have been stolen appears to have been personal, the failure to aver that the property was personal affords no ground of objection to the affidavit or indictment. *Jones v. The State*, 51 Miss. 718.

The next objection made to the affidavit is, that it did not show upon its face that it was sworn to before some officer authorized to administer oaths; that the addition of "clerk" to the name of J. R. Christian was too indefinite and uncertain as to his official character.

The courts take judicial notice of the names and signatures of their officers, and it will be presumed that J. R. Christian was the clerk of the court below, and that he signed the jurat as such clerk, as that court sustained the validity of the affidavit. *Hipes v. The State*, 73 Ind. 39; *Buell v. The State*, 72 Ind. 523; *Brooster v. The State*, 15 Ind. 190.

It is further objected to the affidavit, that the seal of the court below was not attached to the jurat, conceding the jurat to have been signed by the clerk of that court.

That objection is also not well made. The seal of a court need not be attached to the jurat of an affidavit sworn to before its clerk, and to be used only in such court.

The appellant insists that the information ought to have been quashed, because of certain alleged variances between it and the affidavit. These alleged variances impress us as having been quite immaterial, and as no argument has been submitted, or authorities cited, in support of the objections urged to the information, we need not enumerate or consider the objections thus urged.

One of the causes assigned for a new trial was, that the court permitted an attorney of that court, in the absence of the regular judge, and without an appointment as a judge *pro tempore*, in the cause, to receive the verdict of the jury, to send the jury back to their room to amend their verdict, and to again receive their verdict as amended.

Affidavits, in support of this cause for a new trial, are copied

 Adams v. Stringer *et al.*

into the record as a part of the motion for a new trial, but they are not copied into, or verified by, a bill of exceptions, or otherwise made a part of the record. These affidavits are not, therefore, properly copied into the record, and form no part of it. *Adams v. Stringer, post*, p. 175.

Another cause assigned for a new trial was, that the court erred in giving an instruction to the jury, but no specific objection to the instruction has been indicated. We must, therefore, regard the cause, thus assigned for a new trial, as not insisted upon here.

What we have said as to the sufficiency of the affidavit and information, shows that the court did not err in denying the motion in arrest of judgment.

No objection was made, or exception reserved, to the judgment rendered upon the verdict. The general rule in a criminal as well as in a civil cause is, that, where a party is present in court when a judgment is rendered against him, he can not complain of the judgment in this court, unless he has in some way reserved an exception upon it. There is nothing in this case taking the judgment rendered against the appellant out of this general rule. Consequently, this appeal presents no question upon the judgment here.

The judgment is affirmed, with costs.

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126	51

No. 8668.

ADAMS v. STRINGER ET AL.

DURESS.—Threats.—Mere angry or profane words, or strong and earnest language, will not constitute such duress as will relieve a party from his contract; for duress by threats, which will avoid a contract, only exists where such threats excite, or may reasonably excite, a fear of some grievous wrong, as bodily injury or unlawful imprisonment.

SAME.—Fraudulent Representations.—Instruction.—Where a representation, charged to be false and fraudulent, was, that the plaintiff was indebted

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to the defendant in a certain sum, and there was evidence tending to prove that the plaintiff was in fact so indebted, the court properly instructed the jury, that, if they believed such facts to exist, their finding must be for the defendant, upon the question of fraud.

PRACTICE.—New Trial.—Weight of Evidence.—The Supreme Court will not reverse a judgment upon the evidence, if it fairly tends to sustain the verdict or finding on every material point.

SAME.—Motion for New Trial.—Instruction.—The instructions asked for, and refused by the court, can not be made a part of the record of a cause, by merely copying them in the motion for a new trial.

SAME.—Instruction.—Supreme Court.—Where an instruction is given, which states the law correctly as far as it goes, and the only objection to it is, that it does not contain a full statement of the law applicable to the case, the objecting party can not make such objection available in the Supreme Court, by excepting to the instruction given; but, in such case, he must ask the trial court for an additional instruction, to supply the supposed omissions in the one given, and, if such additional instruction is refused, he must see that it, as well as the one given, is made part of the record in one of the modes prescribed by law.

From the Marion Superior Court.

J. W. Gordon, R. N. Lamb, S. M. Shepard and C. F. Robbins, for appellant.

P. W. Bartholomew, for appellees.

Howk, J.—This was a suit by the appellant, David M. Adams, against the appellees, Elza T. Stringer, J. F. Burkett, and Calvin F. Darnell, recorder of Marion county, Indiana, as defendants. In his complaint, the appellant alleged, in substance, that on December 11th, 1878, the said Elza T. Stringer met him, the appellant, in the town of Findley, Ohio, and then and there represented and pretended that, in the year 1865, 1866, 1867 or 1868, while he, the said Stringer, was engaged in business in the town of Ashland, Ohio, he had sold to the appellant a certain lot of dried apples, amounting to \$376, and consigned the same, for the appellant, to Day, Allen & Co., then doing business in Chicago, Illinois, and that the appellant had never paid the said indebtedness, or any part thereof; that the said Stringer, on said December 11th, 1878, at said town of Findley, by force, fraud and duress, by then and there threatening to cause the appellant to be arrested and impris-

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oned for obtaining goods under false pretences, compelled the appellant to make and sign his certain promissory notes, amounting in all to the sum of \$646 (here follows the description of four notes); that, to secure said notes, the appellant then and there also executed and delivered, by reason of said threats and under said duress, to said Stringer, his certain chattel mortgage, by which he mortgaged to said Stringer the one-third interest in the machinery and fixtures of "The Adams Packing Company," located in the rooms Nos. 76 and 78, on East Maryland street, in the city of Indianapolis, in said Marion county. Appellant charged that he had no knowledge of having ever purchased said dried apples from said Stringer, or of any such transaction; that, until said December 11th, 1878, the said Stringer had never made any request or demand of the appellant to pay for said dried apples, though, since said alleged transaction, the appellant had frequently been in said town of Ashland, where said purchase was said to have been made, and had, during the six years since the alleged transaction, been engaged in business in said city of Indianapolis. And the appellant further said, that it was only by reason of said threats, so made by said Stringer, that he would cause him to be arrested and imprisoned unless he would execute said notes and mortgage, he signed and delivered the same; and he said that he was, at the time, 200 miles distant from his home, and that the said Stringer threatened to have him then and there arrested and imprisoned, if he refused to arrange said alleged indebtedness.

The defendant Calvin F. Darnell was the recorder of said Marion county, and the said Stringer had said mortgage in his possession, and had said to appellant that he intended to cause the same to be recorded at once in the recorder's office of said county, and he would do so if not restrained by the order of the court, and the appellant would thereby suffer irreparable loss. The said notes were given without any consideration whatever, and were made payable at the Indiana National

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Bank of Indianapolis, and were then in the hands of the defendant Burkett, as an escrow. The appellant prayed that said Stringer might be restrained from endorsing, selling, or in any manner disposing of said promissory notes, and that the said Darnell might be restrained from receiving for record and recording the said chattel mortgage, and that the said Burkett might be restrained from surrendering the said notes to said Stringer until the final hearing of this cause, and that, upon such hearing, the said notes and mortgage might be cancelled, and the said Stringer be perpetually enjoined from collecting, or in any manner disposing of the same, and for all other proper relief.

The appellees answered by a general denial of the complaint. The issues joined were tried by a jury, and a verdict was returned for the appellees, the defendants below. Over the appellant's motion for a new trial, and his exception saved, the court at special term rendered judgment against him for the appellees' costs. On appeal, this judgment was affirmed by the court in general term.

The only error assigned by the appellant, in the court below in general term, was, that the court at special term had erred in overruling his motion for a new trial. This alleged error he has brought before this court, by assigning here, as error, that the court in general term had erred in affirming the judgment of the special term.

In his motion for a new trial, the appellant assigned the following causes therefor:

1. In refusing to give the jury the instructions numbered one, two, three and four, asked for by the appellant;
2. In the several instructions given the jury by the court, of its own motion;
3. Because the verdict of the jury was not sustained by sufficient evidence; and,
4. Because the verdict of the jury was contrary to law.

The appellant's learned counsel have devoted a large portion of their elaborate brief of this cause to the discussion of

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the insufficiency of the evidence, as they insist, to sustain the verdict of the jury. We deem it unnecessary for us to follow counsel in their arguments on this question, or to extend this opinion by setting out the evidence and commenting at length thereon. The main question at issue between the parties was this: Was the execution of the notes and mortgage described in the complaint procured by the appellee Stringer by force, fraud and duress? Upon this question, the evidence was conflicting, and to us, as it appears in the record, is not very convincing or satisfactory. But the jury trying the cause, and the learned judge who presided at the trial, had the parties to the transaction as living witnesses before them, and saw and heard each of them, under the sanction of his oath, give his own account of the facts and circumstances, incident to and attendant upon the execution by the appellant of the notes and mortgage. The jury found generally for the defendants, thereby virtually finding that the execution of the notes and mortgage had not been procured by force, fraud and duress; and the judge of the court at special term, under whose eye the cause had been tried, refused to disturb the verdict of the jury, for the want of sufficient evidence. More than this, the able and learned court, in general term, sitting as an appellate court, refused to reverse the judgment of the special term, upon the weight of the evidence. In such a case, it can hardly be supposed that this court will, in contravention of its own long-established practice, attempt to weigh the evidence and reverse the judgment below, upon what may seem to us to be the fair preponderance of the evidence. Upon this point, we adhere to the uniform decisions of this court, and decline to reverse a judgment upon the evidence, where it appears, as it does in this case, that there is evidence in the record, which fairly tends to sustain the verdict of the jury on every material point. *Rudolph v. Lane*, 57 Ind. 115; *Swales v. Southard*, 64 Ind. 557; *The Fort Wayne, etc., Railroad Co. v. Husselman*, 65 Ind. 73; *Lane v. Clodfelter*, 67 Ind. 51; *Barclay v. Miers*, 70 Ind. 346.

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The appellant's counsel complain of the decision of the court, in refusing to give the jury certain instructions, at the appellant's request. These instructions were not made part of the record by a bill of exceptions or by an order of the court. Nor were these instructions made part of the record, under the provisions of section 325 of the Code. For, although the statutory formula, of "refused and excepted to," appears at the close of each of these instructions, as copied by the clerk of the lower court, yet this formula was not in any case "signed by the party or his attorney," as the statute requires. 2 R. S. 1876, p. 168. Indeed, these instructions were not even copied into the record, elsewhere than in, and as forming a part of, the appellant's motion for a new trial. In such a case, it may be regarded as settled by the decisions of this court, that the instructions, though copied at length in the motion for a new trial, do not thereby become and constitute a part of the record. *Burnett v. Overton*, 67 Ind. 557; *Bates v. The State*, 72 Ind. 434; *McDonald v. The State*, 74 Ind. 214. It follows, therefore, that the instructions, asked for by the appellant and refused by the court, were not made parts of the record of this cause in any of the modes prescribed by law, and present no question for the decision of this court. Busk. Prac., p. 254, and cases there cited.

The only instruction given the jury by the court, of its own motion, complained of in argument by appellant's counsel, was the fourth, which reads as follows:

"4. A contract made under compulsion may be avoided by the party by whom it was executed. Compulsion, however, to have this effect, must amount to what the law calls duress. Mere angry or profane words, or strong, earnest language, can not constitute such compulsion as will amount to duress, or enable a party to be relieved from his contract. There may, however, be duress by threats. Duress by threats does not exist, wherever a party has entered into a contract under the influence of a threat, but only where such threat excites,

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‘or may reasonably excite,’ a fear of some grievous wrong, as bodily injury or unlawful imprisonment.”

The objection to this instruction, as we understand it, is that it does not contain a full statement of the law applicable to the case, and that it was calculated to mislead the jury trying the cause. So far as the first branch of the objection is concerned, it is sufficient to say, that, if the instruction stated the law correctly as far as it went, and we think it did, then it became the appellant's duty, if he thought the instruction was not sufficiently full, to ask the court for an additional instruction, to supply the supposed omissions in the one given. It was not only his duty to ask for such additional instruction, but if the court refused to give such additional instruction, at his request, it became his further duty to see that it was made a part of the record in one of the modes prescribed by law for that purpose. It seems to us that the instruction complained of contained a fair statement of the law on the subject of duress, as applicable to the case on trial, and we fail to see wherein, or how, it could possibly mislead the jury. The law as stated in the instruction is in strict accord, we think, not only with the decisions of this court, but with the general current of the authorities elsewhere, on the nature and extent of the duress which will enable a party to avoid his contracts. *Bennett v. Ford*, 47 Ind. 264; *Bush v. Brown*, 49 Ind. 573; *Coffelt v. Wise*, 62 Ind. 451; *Reynolds v. Cope-land*, 71 Ind. 422; *Tucker v. The State*, 72 Ind. 242.

The appellant's counsel have criticised, rather than complained of, the third instruction given the jury by the court, of its own motion, which instruction reads as follows:

“3. If you believe that the representation, charged and relied upon as false and fraudulent, was, that the plaintiff was indebted to the defendant in a certain sum, and the plaintiff was in fact so indebted, then your finding must be for the defendant upon the question of fraud. This will be so, even though the defendant may have by mistake wrongly stated

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the items, or some of the items, which formed the consideration of such alleged indebtedness."

Counsel concede in argument that this instruction looks "fair and plausible," and, if applied to a running account between parties, covering numerous transactions, they "have no doubt it states the law correctly." This objection to the instruction seems to us to be untenable. The instruction contains a correct statement of the law, and, in our opinion, was as applicable to the case on trial as it would have been if the appellant's alleged indebtedness to the appellee Stringer had consisted of a running account, covering numerous transactions. If the appellant was indebted to the appellee Stringer in a certain sum, and if Stringer's representation of the fact of such indebtedness was the only representation charged and relied upon as false and fraudulent, and the jury so found, then, clearly, there could be no other finding, on the question of fraud, than a finding for the appellee Stringer, and the court did not err in so instructing the jury.

Upon the whole case, our conclusion is that it does not appear from the record before us that any error was committed by the court in general term, in affirming the judgment of the special term.

The judgment is affirmed, at the appellant's costs.

ELLIOTT, C. J., did not take part in the consideration or decision of this cause.

No. 8108.

ALBRIGHT ET AL. v. GRIFFIN.

PROMISSORY NOTE.—*Renewal Note.*—*Payable in Bank.*—*Evidence.*—*Principal and Surety.*—*Forged Names.*—*Rescission.*—A., M. and H. made their note to G. payable one year after date, M. and H. signing as sureties for A., but it not appearing that G. knew of their suretyship. When due, A. took up

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the note, paying the interest, at 12 per cent., for the past year and for a year in advance, and for the principal delivering to G. a new note payable in bank, but not "to order or bearer," signed as was the first note but the names of M. and H. being forged thereto. A. held this note until after due, when, learning of the forgery, without surrendering the new note or offering to return the money received with it, he brought this action upon the original note.

Held, that the action is maintainable.

Held, also, that G. had the right to treat the money paid him as a payment on the original note. The case is not one of rescission of contract. The new note, if in all respects valid, would have been only a new evidence of the pre-existing indebtedness.

Held, also, that, if the new note had been negotiable, it might perhaps have been necessary to bring it into court to be surrendered or cancelled, but, their names being forged, the sureties could not raise the question.

Held, also, that if the note in question had been put into judgment and execution against A., it would not have extinguished the right of action on the surrendered note.

Held, also, that there was no binding extension of time, even if G. had known that M. and H. were sureties.

SAME—Law Merchant.—Promissory notes, payable at a bank in this State, but not "to order or bearer," are not governed by the law merchant.

SAME—Payment.—Merger.—The giving of such note in renewal of a former one, or for an antecedent debt, unless expressly taken as payment, at the risk of the taker, does not pay or merge the original liability; and, upon default in the payment of the new note, the holder is remitted to his right of action on the former obligation.

SAME—New Note.—Discharge of Prior Note.—Whether the paper be mercantile or non-negotiable, if some of the names are not genuine, and such fact is not known to the taker, it will not operate as a discharge of the prior liability.

SAME—Extension of Time.—An extension of time given to the principal debtor, the creditor not having notice that the others were sureties, does not discharge them.

From the Shelby Circuit Court.

E. P. Ferris, W. W. Spencer, A. F. Wray and J. S. Ferris,
for appellants.

T. B. Adams and L. T. Michener, for appellee.

WOODS, J.—Over the exception of the appellants, the court gave judgment upon a special verdict in favor of the appellee, who was the plaintiff in the action. Errors and cross errors are assigned upon various rulings upon demurrers to

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the pleadings, but the questions thus presented seem to be all involved in the ruling upon the verdict. We therefore confine our consideration to that.

The verdict was as follows:

"1. We find that, on the 20th day of October, 1874, John Albright, with Silas Metzger and George Hartman as his sureties, gave a note, payable in the First National Bank of Shelbyville, Indiana, to plaintiff, Charles Griffin, due one year after date, without relief from valuation or appraisement laws, with ten per cent. interest after maturity, and attorney's fees if suit be instituted on the same, for the sum of \$448, and that the amount of money loaned at the time by the plaintiff to John Albright was \$400.

"2. We further find that, on the 20th day of October, 1875, John Albright, in the absence of the defendants Silas Metzger and George Hartman, went to the residence of the plaintiff, and paid plaintiff the sum of \$96, and gave plaintiff a note, payable in the First National Bank of Shelbyville, Indiana, dated October 20th, 1875, for \$400, due one year after date, with ten per cent. interest after maturity, and without relief from valuation or appraisement laws; and that the names of John Albright, Silas Metzger and George Hartman were signed to said note; and that, as to the defendants in this action, the names of Metzger and Hartman, upon said note, were forgeries, and had not been signed by them, or for them with their knowledge and consent; and that the plaintiff, without any knowledge of the forgery of said signatures, received the note from said John Albright, with his genuine signature thereto, and, on receipt of the \$96 aforesaid, gave up to John Albright the note for \$448, after tearing the signatures to the same almost off, so that there was but one-half inch of paper by which the names were attached to the note; and John Albright gave the note to Silas Metzger soon after the 20th of October, 1875, who has kept and still has it; and that said Metzger or Hartman had no knowledge of the execution of the \$400 note, or the payment of the \$96 by Al-

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bright to Griffin, until the 20th of October, 1876, when the \$400 note was presented to them for payment, when they each notified the plaintiff that the note, as to each of them, was a forgery, and they would not pay it.

"3. There have been no payments on either note except the \$96, paid by Albright October 20th, 1875, when the second note was delivered to the plaintiff.

"4. We find that on the 20th of October, 1875, without the knowledge or consent of either Metzger or Hartman, the plaintiff did extend the time of payment of the \$400 loaned to Albright by the plaintiff, in which transaction Metzger and Hartman were the sureties of Albright only so far as the first note for \$448 was concerned, on the payment of \$48, the interest past due, which was included in the \$448 note, and the further sum of \$48 as interest in advance on the \$400; and that the time for the payment of the \$400 note was fixed definitely between the plaintiff and Albright at the time, as one year, to wit, from October 20th, 1875, to October 20th, 1876.

"5. Before the commencement of this suit, to wit, March 29th, 1878, the plaintiff demanded of Silas Metzger the note of October 20th, 1874, which was refused by Metzger; and that at the time of the demand the plaintiff did not offer to return to Mr. Metzger, or to Hartman or Albright, the \$96 in money which he had received, or the \$400 note of October 20th, 1875, which he still retains in his possession.

"6. A reasonable attorney's fee in this case is \$50.

"7. This suit was commenced May 6th, 1878."

Upon these facts the jury found that the amount due the plaintiff, if anything, was \$511.36, and for that sum the court rendered judgment on the 10th day of April, 1879.

The counsel for the appellants urge several reasons against the right of the plaintiff to a judgment on the verdict. They say that no fraud is shown on the part of Albright; that he made no representation that the signatures of Metzger and Hartman were genuine, and, so far as the verdict shows, did

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not know that they were not genuine; and that the plaintiff therefore took the note at his own risk. But that, if fraud were conceded, the plaintiff, after notice of the facts, had kept the note and money paid him, and by so doing, and by delaying to bring his action, had lost the right, which otherwise he might have had, of resorting to the original obligation.

These propositions involve to some extent, as we conceive, a misapprehension both of the facts found and of the law applicable to the case.

As to the facts, the complaint shows that the first note in question, whose genuineness is not disputed, was negotiable according to the law merchant; but neither the complaint, answers nor verdict show that the second note was of that character. The statute is, that "notes payable to order or bearer in a bank in this State shall be negotiable as inland bills of exchange." While it appears from the verdict, that both notes were made payable in a bank in the State, neither contained the words of negotiability, "to order or bearer."

As to the question of fraud on the part of Albright, it is enough to say, that, if he knew that the names of Metzger and Hartman were forged to the second note, he perpetrated an actual fraud in procuring the plaintiff to accept it and to surrender the original note; and, if he was ignorant of the fact that the names were forged, his presentation of the note to the plaintiff with those names upon it was, under the circumstances, equivalent to a representation by him that the signatures were genuine, and operated to the plaintiff's prejudice as much as if a wilful misrepresentation had been made. And even if it were conceded that Albright acted in good faith, believing the signatures all genuine, the result would be the same. In that case, the delivery and acceptance of the renewal note came about through the mutual mistake of Albright and the plaintiff, and the transaction was no more binding on the latter than if he had been drawn into it by fraud.

It necessarily follows that there was no such agreement for

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the extension of time as operated to discharge the sureties. The receipt of the \$96, to be applied one-half to the principal debt and the remainder as interest for the ensuing year, was not a separate transaction, unaffected by the fraud or mistake connected with the receipt of the note. The entire debt was due to the plaintiff, and, upon learning the deception practiced upon him, he had a right to disregard the terms of his agreement with Albright, and treat the whole sum received as a payment on the debt at the date when he received it, and was equally free to bring an action upon the original note. It is only a valid contract for the extension of time, which restricts the creditor's right to sue, that discharges the surety. *Lemmon v. Whitman*, 75 Ind. 315.

Moreover, it is not found that the appellee had notice that the appellants were sureties, and, without such notice, his agreement to extend the time did not discharge the sureties. *Davenport v. King*, 63 Ind. 64; *Arms v. Beitman*, 73 Ind. 85.

The case of *Wilkins v. Reed*, 6 Greenl. 220, is much in point. It was an action of assumpsit against the makers of a promissory note, with the common money counts. The opinion of the court is as follows: "The note declared on is, in form, a joint one, and the case finds that it was never signed by Libby, or by his authority, and, therefore, the action is not maintainable on the first count; and the only question is, whether it is on either of the general counts upon the original cause of action. The note being negotiable, is said to have merged all implied promises, and that, therefore, the remedy of the plaintiffs exists only against Reed upon the note, on which he may sustain a several action against him. There is no doubt as to the principle relied on by the defendants, where the parties to the implied and the express promise are the same. Nor is there any doubt that, when a creditor of two persons knowingly and intentionally takes the security of one of them only, which security is valid in law, the other original debtor is considered as discharged. But, in the present case, there is no pretence for supposing that the plaintiffs ever intended to extin-

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guish the liability of Libby. The very form of the signature of the note proves the contrary. Libby never could be sued on the original account, except by the present plaintiffs; and, in such an action, the verdict and judgment in this action would be pleadable in bar. He can not, therefore, be endangered, as the note is void in respect to him. Perfect justice has been done by the verdict, and both defendants are safe."

The same doctrine is declared in *Perrin v. Keene*, 19 Mc. 355, which arose upon a note given for a partnership liability, executed after dissolution of the firm, by one member of the firm. It is said: "This note, given without authority, does not extinguish the account. If it did, it would be a new cause of action. If not, then the account remains the same subsisting demand and may be brought in by way of amendment. 5 Pick. 303. If the notes were given without authority, they were not a payment of the debt, and the account remains undischarged. It may be said, that the note binds the agent or partner who made it, even if he undertakes to use the copartnership name without authority. The answer is, it can bind him alone, and the plaintiffs did not intend to take the note of Weston alone. They meant to have the security of the copartnership. The note, then, being the note of Weston alone, the presumption of payment is rebutted." See also 2 Daniels Neg. Inst. (2d ed.), sec. 1369.

The taking of the second note, and surrender of the first, even if there had been no fraud or mistake, did not operate as a payment or extinguishment of the original obligation, and, upon default in the payment of the latter, the plaintiff was remitted to his right of action on the former instrument. This is the well settled rule in this State, as well as elsewhere. *Tyner v. Stoops*, 11 Ind. 22; *Stevens v. Anderson*, 30 Ind. 391; *Maxwell v. Day*, 45 Ind. 509; *Alford v. Baker*, 53 Ind. 279; *Hill v. Sleeper*, 58 Ind. 221; *Bristol M. & M. Co. v. Probasco*, 64 Ind. 406; *Smith v. Bettger*, 68 Ind. 254.

These cases all recognize the doctrine as stated in *Muldon v. Whitlock*, 1 Cowen, 290, that "no principle of law is better

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settled, than that taking a note, either from one of several joint debtors, or from a third person, for a pre-existing debt, is no payment, unless it be expressly agreed to be taken as payment, and at the risk of the creditor. Nor does the taking a note, and giving a receipt for so much cash, in full of the original debt, amount to evidence of such express agreement to take the note in payment. The agreement must be clearly and explicitly proved by the original debtor, or he will still be held liable." See, also, *Vancleef v. Therasson*, 3 Pick. 12.

Indeed, the general holding elsewhere is, that the acceptance by a creditor of negotiable paper, made or endorsed by his debtor on account of the claim, operates presumptively only as a conditional payment or temporary merger; and, if the paper is not honored at maturity, action may be brought on the original claim. See note 2 and cases cited in 2 Ames Cases on Notes and Bills, 571-2. And the rule everywhere must be that the acceptance of forged paper of whatever character, in ignorance that the names or any of them are not genuine, will not discharge the prior liability.

The proposition, that the plaintiff ought to have returned, or offered to return and surrender, the second note and the money received with it, is based on the mistaken idea that the rules applicable to the rescission of contracts apply to this transaction. The new note, if in all respects valid, amounted only to "a new, and perhaps better, form of evidence" of the pre-existing indebtedness—*Maxwell v. Day*, *supra*; and, according to some cases, if sued upon and put into judgment and execution, against Albright, but not satisfied, would not have extinguished the right of action on the surrendered note. *Davis v. Anable*, 2 Hill, 339; *Hawks v. Hinchcliff*, 17 Barb. 492; *Corn Exchange Ins. Co. v. Babcock*, 57 Barb. 231; *First National Bank v. Morgan*, 6 Hun, 346.

In *Alford v. Baker* it is said that the reason why the giving of a negotiable note operates as a payment is, "that the maker might be put to inconvenience, and perhaps obliged to pay the debt twice, as he can not set up a payment of his

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original debt, after a seasonable endorsement of the note, against the claim of an innocent holder." In *Smith v. Bettger*, too, it is said: "When the debtor gives a promissory note not governed by the law merchant for an existing debt, he can not be subjected to the payment of the debt twice, for the payment of either the original debt or the note is a discharge of both; but, when the debtor gives a bill of exchange or a promissory note governed by the law merchant, * * * unless the negotiable paper was held to be a payment, we do not see why the creditor could not * * subject the debtor to the payment of his debt twice. The only way we see to avoid these consequences would be to compel the creditor at the time of trial, if he sued on the original debt, to produce, deliver up and cancel the negotiable paper received for the debt."

The plain inference here is, that there is no necessity for the surrender and cancellation of non-negotiable paper.

There is no more reason for it than in cases of suits upon such notes, in which affirmative defences only are pleaded. In such cases the production of the note for formal cancellation is never required. The record furnishes ample protection against any subsequent suit upon it, and the same may be said of the record, in this case, which describes and identifies both notes, and renders any misuse of the second one practically impossible.

In *Thurston v. Blanchard*, 22 Pick. 18, the following pertinent language is used: "The precise question then is this, whether the vendee's own note not negotiated, comes within the rule. Had it not been negotiable, we think it quite clear, that there would be no necessity of returning it. Rescinding the contract for the sale, rescinds the contract of payment by the vendee. A note not negotiable, would have been nothing more than an express promise to pay for the goods, and would have been avoided with the sale. The court are of opinion, that a note, though payable to order, whilst it remains in the hands of the promisee, the vendor of the goods, is to be put on the same footing, and that the delivering it up was not a

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condition precedent to bringing the action. If not produced at the trial, to be surrendered, it might be presumed that it had been negotiated, and that would have been a bar to the action, upon the rule stated." This was said in an action of replevin, brought without previous demand, by the vendor against the vendee, for the recovery of the goods for which the note was given, and it was only because it was a commercial or negotiable note, that its production for cancellation was held necessary. For similar cases, see *Nichols v. Michael*, 23 N. Y. 264, and *Coghill v. Boring*, 15 Cal. 213.

It may be observed, that the appellee was not bound to accept as true the affirmation of the appellants that their names to the renewal note were not genuine. He had a right to entertain doubt on that subject, and to have the matter judicially determined. It was his unquestionable privilege, and perhaps the more prudent course for him to have followed, to have based his action upon both notes, leaving it to the defendants, by their answers, to determine for themselves by which obligation they would be held; and it certainly can not be that the position of the appellee is any the worse because he accepted the word of the appellants, and treated the second note as being the forgery, which they affirmed it to be. Nothing, in any aspect of the case, has been done to their injury. For the money paid by Albright, they had full credit, the portion of it which was usurious having been applied for their benefit. Albright alone executed the second note, and he alone, if anybody, might insist upon its surrender. He, however, makes no question, and the appellants clearly have no right to.

Judgment affirmed, with costs.

City of Richmond *et al.* v. McGirr.

No. 8279.

CITY OF RICHMOND ET AL. v. MCGIRR.

CITIES.—Loans.—The purchase of real estate by a city on a credit of ten years is not a loan within the meaning of the statute, R. S. 1881, section 3159, and is not prohibited thereby.

SAME.—Implied Powers.—Statute Construed.—Section 3106, clause 4, R. S. 1881, conferring on cities the general power, without restriction, to purchase real estate, for the purpose of constructing public buildings thereon, gives by implication the exclusive right to determine the expediency of the purchase, the power to purchase on credit, and also to issue its negotiable bonds for the purchase-money.

From the Wayne Superior Court.

J. L. Rupe, for appellants.

S. A. Forkner, for appellee.

FRANKLIN, C.—Appellee filed a complaint to enjoin the issuing and delivery of eight bonds, by the City of Richmond, to James L. Morrison, for the sum of \$1,000 each, payable, respectively, in one, two, three, four, five, six, seven and eight years, bearing interest at the rate of six per cent. per annum, as the consideration for a certain lot of land, situated within the corporate limits of the said city, to be used for the purpose of erecting thereon public buildings.

The defendants severally demurred to the complaint, which demurrers were overruled. Answer by a denial and a special paragraph; demurrer to special paragraph sustained. These rulings were severally excepted to. The denial was withdrawn, and, for the want of a further answer, judgment was rendered for appellee, and an appeal taken by the defendants to this court.

The errors assigned in this court are:

- 1st. Overruling the demurrers to the complaint;
- 2d. Sustaining the demurrer to the special paragraph of the answer;
- 3d. In rendering final judgment herein.

The last error assigned is too general to present any question for decision.

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As the first and second errors assigned, together, embrace the facts out of which the questions arise, which the counsel have submitted for decision, we will consider them both at the same time.

The complaint alleges that the City of Richmond is a municipal corporation, acting under the general laws of the State; that appellant Bennett is mayor, and appellant King is clerk, of the city; that the appellee is a taxpayer of said city, a resident, and owns both real and personal property therein; that the city already holds, by a perpetual lease, a lot or parcel of ground, upon which are located and erected large and commodious public buildings, sufficient for all the purposes of said city for the next ten years to come; that said city proposes to purchase of one Charles T. Price, Jr., Lot No. 122 in said city, and, in payment, to issue eight negotiable bonds of the city to one James L. Morrison for \$1,000 each, falling due annually thereafter; that said city is now in debt to the amount of \$160,600, evidenced by bonds, drawing annually an aggregate interest of \$11,000; that the owner of said lot is a fraudulent grantee; that said lot is incumbered beyond its value; that the lot is not needed for city purposes, and its purchase would be a needless expenditure of the public money; that the issuing of the bonds would be contrary to, and in violation of, the law.

The complaint contains, as an exhibit, a copy of the ordinance of the common council, providing for the purchase of and payment for the lot, and also providing, "that upon the execution of a good and sufficient deed to said city, conveying a clear and perfect title to lot No. 122, in Starr's addition to the City of Richmond, and a delivery of the same by James L. Morrison to them, and upon the full satisfaction of all existing liens and incumbrances upon said real estate, said committee shall deliver said bonds to said James L. Morrison, at par, in full payment for said real estate."

The special answer avers, that, before the commencement of
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this suit, the said Charles T. Price, Jr., had proposed in writing to sell said lot to the city for \$8,000, and let the whole proceeds of the sale go in extinguishment of the liens and incumbrances upon it; that said James L. Morrison, who held the liens and incumbrances on the lot, also proposed in writing to accept said proceeds in full satisfaction thereof, and release the lot therefrom; that said Morrison then held said liens and incumbrances, amounting to about \$13,000, (copies of these propositions were filed therewith as exhibits); that the common council of said city passed a resolution accepting said propositions, and declaring that it would be to the interest of said city to purchase said real estate upon the terms of said propositions, for the purpose of erecting thereon suitable public buildings for the use of said city authorities, and directing the committee of said council on public buildings and markets to accept, on the part of said city, the said propositions in writing, before referred to, of said Price and said Morrison, and purchase said real estate for the use of said city, for the purpose aforesaid, and upon the terms of the propositions aforesaid, a copy of which was filed therewith as an exhibit. And thereupon said committee of the common council on markets and public buildings did, long before the bringing of this suit, notify said Price and Morrison of the acceptance of their said propositions, and did, for and on behalf of the city, long before the commencement of this suit, so purchase said lot for said city, and, long before the bringing of this suit, said council passed the necessary ordinance providing for the payment for said lot, a copy of which was filed therewith as an exhibit.

The demurrers admit the facts in both of these pleadings to be true, and upon these facts a number of questions have been raised by counsel, though but one has been discussed at any considerable length.

Appellants, in their brief, in reply, say they do not question the power of a court of equity to enjoin the illegal issue of municipal bonds, nor the right of a taxpayer to maintain such

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a suit, nor the new constitutional limitation of municipal indebtedness, nor that municipal bonds are governed by the law merchant.

It is insisted by appellee's counsel that the common council of the city had no power to create a debt and issue bonds therefor running longer than one and two years; and this is the substantial question in the case between the parties.

The 45th subdivision of the 53d section of the general law of this State for the incorporation of cities, 1 R. S. 1876, p. 295, reads as follows: "To purchase, hold or convey real estate for the purpose of constructing public buildings thereon," etc. This is among the enumerated powers of the common council in that section, which begins by saying: "They shall have the management and control of the finances of the city, and of all property, real and personal, belonging thereto; and shall have the additional power herein permitted and may make and publish by-laws and ordinances necessary to enforce the same. The common council shall have the power to enforce ordinances."

This 45th clause gives express authority to the common council to purchase real estate for the purpose of constructing public buildings thereon, and there can be no doubt of the right of the council to do so. The expediency of doing so, and when and how to do so, are questions controlled by the discretion of the common council. And the learned judge who tried this case in the court below, in his opinion, has well said, "that whenever the General Assembly has conferred upon any officer, body or tribunal, the right to exercise a discretion in regard to any matter, no court can, as a general rule, interfere with or control the exercise of that discretion." Dillon on Municipal Corporations, section 58; *Kelley v. City of Milwaukee*, 18 Wis. 83; *Barker v. Boston*, 12 Pick. 184; *Ex parte Fox*, 15 Pick. 243; *Parks v. Boston*, 8 Pick. 218; *Benjamin v. Wheeler*, 8 Gray, 409; *Evansville, etc., R. R. Co. v. City of Evansville*, 15 Ind. 395; *Macy v. The City of Indianapolis*, 17

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Ind. 267; *The City of Greencastle v. Hazelett*, 23 Ind. 186; *Brinkmeyer v. The City of Evansville*, 29 Ind. 187.

Still, it is insisted by appellee's counsel, and was so decided by the court below, that all the provisions of the charter must be considered and construed together; and that the 83d section in the miscellaneous provisions should be considered in connection with, and as a modification or a construction of, the 45th clause of the 53d section. This 83d section reads as follows: "Loans may be made by a vote of two-thirds of the common council, in anticipation of the revenue of the current and following year, and payable within that period; but the aggregate amount of such loan in any fiscal year shall not exceed the levy and tax authorized by this act for municipal expenses for the same year." It is insisted that this section limits the amount of indebtedness that can be created in any one year, and that it must be paid in that and the succeeding year.

But it is insisted that the purchase of the lot and the agreeing to pay the consideration therefor were the same thing as borrowing money; that it was in substance Price paying his indebtedness to Morrison, and Morrison loaning the money to the city. The city got no money by loan or otherwise, but it got the property and agreed to pay for it. We can not see anything like a loan in the transaction.

We think there is a difference between borrowing money and the paying of an indebtedness. The Supreme Court of the United States has expressly so decided. In the case of *Gelpcke v. City of Dubuque*, 1 Wallace, 221, SWAYNE, J., in delivering the opinion of the court, held, that the execution of bonds, to pay an existing indebtedness of the city, was not within the prohibitions of the charter against the borrowing of money.

The case of *The Mayor, etc., of Baltimore v. Gill*, 31 Md. 375, referred to by appellee's counsel, was under a constitutional prohibition against the creation of an indebtedness beyond certain limits.

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And, also, the case of *Jonas v. The City of Cincinnati*, 18 Ohio, 318, was under a prohibition contained in the charter: "That it shall not be lawful for the city council to make or authorize any contract * * for the payment of money at any day beyond the current fiscal year." Under this provision the court held that it was a violation of the spirit of the charter for the council to pass an ordinance for the payment of improvements, after the fiscal year had expired in which they were made.

We do not think either of these cases are applicable to the case under consideration. While the charter of the City of Richmond (the general law of the State) contains a limitation upon the borrowing of money, it contains no restriction upon the creation of indebtedness.

The charter expressly grants to the council the power to purchase the real estate mentioned in the complaint; and in the absence of any statutory mode being pointed out for the exercise of such power, it may contract with reference to such power the same as a natural person; and such power is implied from the general unlimited power granted. This rule, we think, arises from the necessity of the case, and is in harmony with the general rule of the law as established by the authorities. *Ketchum v. The City of Buffalo*, 14 N. Y. 356; *Brady v. The Mayor, etc., of Brooklyn*, 1 Barb. 584; *Halstead v. The Mayor, etc., of New York*, 5 Barb. 218; *Mott v. Hicks*, 1 Cow. 513; *Moss v. Oakley*, 2 Hill, 265; *Kelley v. Mayor, etc., of Brooklyn*, 4 Hill, 263; Field on Corporations, section 271; *City of Galena v. Corwith*, 48 Ill. 423; *City of Williamsport v. Commonwealth*, 84 Pa. St. 487; *City of Lafayette v. Cox*, 5 Ind. 38; *Hardy v. Merriweather*, 14 Ind. 203; *Daily v. City of Columbus*, 49 Ind. 169; *Kyle v. Malin*, 8 Ind. 34; Dillon Municipal Corporations, section 55, note 1, and sections 81 to 85.

The council having the right to purchase the property, in the absence of anything in the charter to the contrary, had the right to purchase it on a credit, and, having created an

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indebtedness lawfully, from the very nature of the case, would have the right to execute evidences of that indebtedness, and obligations to pay the same. And as to the kind and form of the evidences and obligations to be executed, the council, in the exercise of a sound discretion, must determine, and their determination, in the absence of fraud, is final. *Sheffield School T'p v. Andress*, 56 Ind. 157; *School Town of Monticello v. Kendall*, 72 Ind. 91; *Bicknell v. Widner School T'p*, 73 Ind. 501.

Judge DILLON, in the third and recent edition of his valuable work on Municipal Corporations, after reviewing the authorities, and adhering to his former opposition to the implied power to execute negotiable bonds, says: "But it must be admitted that down to the present time a majority of the express adjudications on the subject favor the contrary opinion." See sections 117 to 130, with notes.

In speaking of the law of Indiana, as to the implied powers of municipal corporations (section 119), he says: "In Indiana, the doctrine is that corporations, along with the express and substantive powers conferred by their charters, take by implication all the reasonable modes of executing such powers which a natural person may adopt. It is a power incident to corporations in the absence of positive restriction to borrow money as means of executing the power." And he cites in a note a large number of authorities in support thereof.

Under the foregoing authorities, we think the doctrine is well established in this State that corporations possess all the necessary incidental powers to carry into full operation all their expressly granted powers, and for such purposes may legally execute commercial paper, such as negotiable bonds, in the absence of any restriction in the charter, or fraud in the parties.

We think the court below erred in overruling the demurrer to the complaint, and in sustaining the demurrer to the special paragraph of the answer.

For which the judgment below ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing

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opinion, that the judgment below be, and the same is, in all things, reversed, at appellee's cost, and that the cause be remanded, with instructions to the court below to sustain the demurrer to the complaint, and for further proceedings in accordance with this opinion.

No. 8528.

DOUGLASS ET AL. v. KEEHN.

78	199
130	439
78	199
139	27

PRACTICE.—Judgment.—Record.—Motion to Supply Omission.—Limitation.—A proceeding to correct the record of a judgment rendered December 11th, 1877, by a motion to supply an omission, filed January 14th, 1880, under section 99, 2 R. S. 1876, p. 82, came too late and should have been dismissed because not commenced within two years.

SAME.—Pleading.—In such a proceeding no formal pleading beyond the complaint, or motion, is necessary, and the application should be heard and decided in a summary manner.

SAME.—Objection to the proceeding may be made by a motion to quash, or to dismiss, for reasons apparent upon the face of the pleading and accompanying affidavits.

From the Kosciusko Circuit Court.

C. Clemans and *A. C. Clemans*, for appellants.

BICKNELL, C. C.—This was a written motion by the appellee to correct the record of a judgment, by supplying an alleged omission therein, so as to make it show that the original note therein sued on was filed with the complaint; annexed to the motion was an affidavit in support thereof by the attorney of the appellee.

The appellants appeared without process and moved to dismiss the motion because it was filed more than two years after the rendition of the judgment, as was shown by the motion itself. The motion to dismiss was overruled.

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The appellants then filed a demurrer to the motion for two causes, to wit:

1st. That the court had no jurisdiction of the motion.

2d. That the motion did not state facts sufficient, etc.

The demurrer was overruled; the appellants then answered the motion by a general denial, and the record says, "the cause was submitted to the court for determination upon the pleadings and proofs." The court found for the appellee, and rendered judgment that the record be amended so as to recite that the original note, therein sued on, was filed with the complaint as an exhibit thereto. Motions of the appellee for a new trial and in arrest of judgment were overruled, and the appellants excepted, and appealed from the judgment.

They assign errors as follows:

1. In overruling the motion to dismiss;
2. In overruling the demurrer to the motion;
3. In overruling the motion in arrest of judgment;
4. In overruling the motion for a new trial.

The following were the causes alleged for the new trial:

1. The finding is contrary to evidence;
2. The finding is contrary to law;
3. The finding is against the weight of the evidence.

In the foregoing proceedings there were several irregularities. Originally, such relief was granted upon motion only. Under the amendment of section 99 of the practice act, adopted in 1867, Acts 1867, p. 100, the proceeding may be by complaint or motion. *Smith v. Noe*, 30 Ind. 117. But, in either of these modes, no formal pleadings are necessary beyond the complaint, or motion. *Nord v. Marty*, 56 Ind. 531. The answer, therefore, and the demurrer and the submission of the cause upon the pleadings and proofs, were all irregular. *Lake v. Jones*, 49 Ind. 297. The application, whether by complaint or motion, is a summary proceeding and should be heard in a summary manner, upon the depositions, affidavits or oral testimony of both parties, except that when the applicant is required to show a meritorious cause of action or de-

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fence, there can be no counter affidavits or contradicting evidence upon that matter. *Ratliff v. Baldwin*, 29 Ind. 16; *Buck v. Havens*, 40 Ind. 221.

If such a complaint or motion, and the affidavits filed therewith, are insufficient to warrant any relief, the objection is properly made by motion to quash or to dismiss the proceeding. Such a motion was made in this case, and it ought to have been sustained, because it appeared upon the face of the proceeding, that the motion was made more than two years after the judgment was rendered in which the omission was sought to be supplied.

Where a proper case is made under section 99, *supra*, within the time limited by that section, the court is bound to grant the proper relief. *Phelps v. Osgood*, 34 Ind. 150. The party must not only file his motion or complaint within the two years prescribed by said section, but he must issue his process thereupon within the two years. *Temple v. Irvin*, 34 Ind. 412. In the case at bar, the judgment was rendered on December 11th, 1877, and the motion was filed on January 14th, 1880.

The court therefore erred in overruling the motion to dismiss the proceeding, and for this error the judgment of the court below ought to be reversed, and this proceeding should be remanded with instructions to the court below to sustain the defendants' motion to dismiss the proceeding.

PER CURIAM.—It is therefore ordered by the court, upon the foregoing opinion, that the judgment of the court below be, and it is hereby, in all things reversed, at the costs of the appellee, and this cause is remanded with instructions to the court below to dismiss the proceeding.

American Insurance Company v. Yearick.

No. 7716.

AMERICAN INSURANCE COMPANY v. YEARICK.

78	203
135	590

PRACTICE.—Demurrer.—Exception.—An exception to the overruling of a demurrer must be taken at the time of the decision. It is not saved if, at a subsequent term, the party announces that he will abide by the demurrer, and excepts to the ruling made at the prior term.

From the Marshall Circuit Court.

W. B. Hess, for appellant.

A. C. Capron and *C. Richardson*, for appellee.

WOODS, J.—At the November term, 1877, of the circuit court, a demurrer was sustained to the appellant's complaint. No exception was noted or taken to the ruling at the time when it was made, and no further step taken in the case until the following September term, when the following order-book entry was made: "Come again the parties by counsel, and the plaintiff says he will not amend his complaint, but abides the demurrer, and excepts to the ruling of the court in sustaining the demurrer."

The court thereupon gave judgment for the appellee, from which the plaintiff has appealed, and insists that the ruling upon the demurrer was erroneous. The appellee, however, claims that an exception to the ruling has not been saved; and in this view we are constrained to concur. The rule of the code, R. S. 1881, section 626, is explicit, that an exception to any ruling of the court must be taken "at the time the decision is made;" and, reading sections 343 and 345 together, it is plain that the rule is, in this respect, the same, whether the exception must be saved by a bill of exceptions, or by "causing it to be noted at the end of the decision."

However technical the rule may seem to be as applied to the case in hand, it is nevertheless the rule, and, in its general application, unquestionably salutary; and we can not undertake to create and define exceptions to it.

The judgment is affirmed, with costs.

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No. 7149.

THE PENNSYLVANIA COMPANY v. HOAGLAND ET UX.

78 203
152 671

NEGLIGENCE.—Railroad.—Passenger Trains.—Rights of Passengers.—Contributory Negligence.—A passenger on a passenger train, unacquainted with the route of the railroad, and with the location of towns and cities along such route, may lawfully rely upon the statements of the conductor and brakemen in charge of the train, in regard to his stopping-place; and if, so relying, such passenger leaves the train at the wrong place, and is damaged thereby, the railroad company will be liable to such passenger for such damages, induced by the negligence of its agents in charge of the train, if there be no contributory negligence of such passenger. WOODS, J., dissents.

PRACTICE.—Admission of Evidence.—Grounds of Objection.—Supreme Court.—Where, on the trial of a cause, a party objects to a question put to a witness, the record must show that the party stated to the court the grounds of his objection, or the action of the court thereon will not be considered by the Supreme Court. In such a case, the party can not state one ground of objection to the trial court, and insist upon other and different grounds in the Supreme Court.

From the Porter Circuit Court.

J. Brackenridge, J. R. Carey, A. Zollars and F. T. Zollars,
for appellant.

G. W. Beeman, for appellees.

HOWK, J.—This suit was commenced by the appellees, in the Starke Circuit Court, to recover damages for injuries alleged to have been sustained by the appellee Hattie E. Hoagland, the wife of her co-appellee, from the fault and negligence of the appellant's servants, and without fault on her part. The appellant answered, by a general denial of the complaint; and, on its application, the venue of the cause was changed to the court below. The issues joined were there tried by a jury, and a special verdict was returned, in substance, as follows:

"We, the jury, having been required to find a special verdict in this cause, do find the facts therein to be as follows:

"1. The defendant is a railroad corporation, operating a railroad extending from the city of Chicago, in the State of

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Illinois, to and beyond the city of Plymouth, in the State of Indiana, and running through Starke county, in Indiana, conveying both freight and passengers, and was operating said railroad on the 15th day of December, 1876, and for several years prior thereto; that Grovertown is a station on said railroad, between the city of Chicago and the city of Plymouth, about ten miles west of said city of Plymouth, in said Starke county; that, on the 15th day of December, 1876, the plaintiff Hattie E. Hoagland purchased of defendant's agent, in said city of Chicago, a ticket entitling her to a passage in the defendant's cars, operated on said railway from the city of Chicago to the city of Plymouth; that she took passage on defendant's passenger train, which left Chicago at five o'clock and fifteen minutes, Chicago time, or five o'clock and thirty-five minutes, Columbus time, which was the time by which said railroad was operated; that, soon after said train left Chicago, Sylvester McMahon, the conductor in charge of said train, took up the ticket so purchased by the plaintiff, Hattie E., and gave her a conductor's check, with figures thereon, denoting that she had paid her fare to said city of Plymouth; that, soon after the said train left Wanatah, a station on the line of said railroad thirty miles west of the city of Plymouth, one of the brakemen on said train entered the car, in which the said Hattie E. was riding, and, in an audible voice, announced that the next station will be Plymouth; that, soon after the brakeman had made such announcement, the conductor of the train came to said Hattie E. and took up the conductor's check which he had given her on taking up her ticket; that she then asked the conductor, if the next station was Plymouth, to which he answered, 'Yes, the next station is Plymouth, your stopping-place;'; that the train continued on its course until it reached Grovertown, when it run on the side-track and stopped; that no notice was given to the passengers on said train, by the conductor or brakemen thereof, or by any other person, that the train had not reached Plymouth; that the said Hattie E., relying upon the announce-

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ment made by the brakeman, when the train left Wanatah, and upon the conductor's statement, when he took up her station-check, that the next station was Plymouth, in good faith believed that the train had reached Plymouth, and left the train; that, when she alighted from said train, a freight train was standing on the main track, and was just starting out; that, within one minute from the time said Hattie E. alighted from said passenger train, it moved off, and she was left entirely alone; that said train arrived at Grovertown at 8 o'clock and 43 minutes P. M.; that the night was very cold, with the wind blowing hard from the northwest; that Grovertown is a small station on said railroad; that, when Hattie E. alighted from said train, she was unable, on account of the darkness, to see any house or other building; that there was no light in sight, except the blue light at the end of the switch or side-track, at said Grovertown; that at the time, the said Hattie E. was wholly unacquainted with the country along the line of said railroad, and with said Grovertown; that she had never been on, or passed over, any part of said railroad prior to said day, and had never seen the towns, villages and country through which it passed; that, after alighting from said train, and after it and said freight train had moved off, she, the said Hattie E., started in search of some human habitation, where she could obtain shelter; that she followed back the railroad track a distance of near two miles, and finding no house, she turned around and retraced her steps, and after passing beyond the point where she alighted, and after having been out and exposed to the extreme cold for more than one and one-fourth hours, she finally found the house of Peter Welch, an employee of the defendant, where she remained until morning; that, by reason of such exposure to the cold, the said Hattie E. suffered severely in body, and was occasioned great anxiety of mind, and contracted a severe cold, and required the attendance of a physician; that, when said train stopped at Grovertown, neither the conductor nor brakeman of said train was in the car in which the said Hattie E. was riding;

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that when she was about to alight from said train, and after she had got outside of the car and on the platform, a brakeman stepped down from the platform of the car and said to her, 'I will help you off on this side, as a freight train is standing on the other side;' that said brakeman did assist the said Hattie E. in getting off the car, and then said to her, 'Don't hurry, you have plenty of time; stand still until the train passes by, and you are all right;' that said brakeman then went back into the car upon the platform of which he was when said Hattie E. first saw him; that, on the following morning, the said Hattie E. went on the local freight train of the defendant, at Grovertown, and was carried thereon to the city of Plymouth; that Grovertown was not a regular stopping-place for said train, but that it stopped there because it had been signalled to stop by the conductor of a freight train.

"We further find that, from the failure of defendant and its agents and servants, in charge of said train, in stopping the same at Grovertown without having given any notice to plaintiff Hattie E., that the train had not yet reached Plymouth, the said Hattie E. was induced to and did leave said train at Grovertown, and was subjected to said exposure, cold and suffering as aforesaid.

"If, upon these facts, the law is with the plaintiffs, then we find for the plaintiffs, and assess their damages at three hundred dollars.

"And, if the law is with the defendant, then we find for the defendant."

Over the appellant's motions for a new trial, and for a *venire de novo*, and its exceptions saved, the court rendered judgment for the appellees, the plaintiffs below, for the damages assessed in the special verdict, and the costs of suit; and from this judgment this appeal is now here prosecuted.

In this court, the appellant has assigned, as errors, the following decisions of the circuit court:

1. In rendering the judgment for the appellees, when the same should have been rendered for the appellant;

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2. In overruling its motion for a new trial ;
3. In overruling its motion for a *venire de novo* ;
4. In permitting the appellee Hattie E. Hoagland, over appellant's objections, to be sworn and examined as a witness on appellees' behalf, on the trial of this cause ; and,
5. Because the special verdict was not sustained as to the facts found by the evidence, and found negligence as a matter of fact, instead of leaving it to the court as matter of law, and was in effect a general verdict.

It is earnestly insisted on behalf of the appellant, that the facts found by the jury, in their special verdict, do not show negligence on the part of the appellant's servants or employees, in the carriage of the appellee Hattie E. Hoagland, on its passenger train, from Chicago, Illinois, to Plymouth, in this State. Doubtless, it is true, as claimed by counsel, that, unless the facts found by the jury show, that the appellee Hattie E. without any contributory fault on her part, was induced to and did leave the appellant's train, before its arrival at her place of destination, by and through the fault and negligence of the appellant's servants, the law of the case was with the appellant, and the court should have rendered judgment accordingly. But it seems to us, that the facts found by the jury do show, that the injuries complained of were the direct result of the fault or negligence of the appellant's servants, in this, that they failed to notify the appellee Hattie E. Hoagland, when the train was stopped at Grovertown, that it had not yet reached the city of Plymouth. The conductor and brakemen, in charge of the passenger train, were the agents and representatives of the appellant ; and the said Hattie E., as a passenger under their charge, had the right to rely implicitly upon their statements to her and in her hearing, that the next station or stopping-place of the train would be Plymouth, her place of destination. The jury found in their special verdict, that, when the said Hattie E. asked the conductor of the train if the next station was Plymouth, his answer was, "Yes, the next station is Plymouth, your stopping-place." It seems clear to us, that,

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from the conductor's answer to her question, she had the right to believe, and to act upon such belief, without being chargeable with contributory negligence, that the next stopping-place of the train would be Plymouth, her stopping-place. It is manifest that the object of her question was to learn whether or not the next stopping-place of the train would be her stopping-place; and so, it would seem, from his answer to her question, she was understood by the conductor.

When, therefore, by an unexpected signal, the train was stopped at an unusual station, ten miles west of the city of Plymouth, we are of the opinion that it was the duty of the appellant's conductor, in view of what he had previously said to the appellee Hattie E. Hoagland, to have informed her promptly that the train had not yet arrived at Plymouth. This, the jury found, he had wholly omitted to do. In this omission, we think the conductor was guilty of negligence; and for the damages sustained by said Hattie E., in consequence of this negligence and without fault on her part, the appellant was properly held to be liable.

The appellant's counsel also complain, in argument, of the decisions of the trial court in overruling their objections to two certain questions propounded by the appellees to a witness, and in permitting the witness to answer. As to one of these questions, it is sufficient to say that the bill of exceptions shows, that the appellant did not point out or state to the court the grounds of its objection to the question or to the evidence sought to be elicited thereby. In such a case, the rule is settled that this court will not consider the admissibility of the evidence, nor any objections made here, either to the question or to the answer thereto. *Rosenbaum v. Schmidt*, 54 Ind. 231; *McCormick v. Mitchell*, 57 Ind. 248; *Peachee v. The State*, 63 Ind. 399.

As to the other question, the bill of exceptions shows, that the appellant pointed out a specified ground of objection thereto. In this court, however, the ground of objection below is abandoned; and the appellant's counsel here insist that

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the decision below was erroneous upon entirely different grounds of objection, which were not pointed out to the trial court. These grounds of objection to the question this court will not consider.

We have now considered and decided all the questions presented and discussed by the appellant's counsel, in their brief of this cause; and we have found no error in the record before us, which, in our opinion, would authorize the reversal of the judgment below.

The judgment is affirmed, at the appellant's costs.

WOODS, J., dissents on the ground that the case shows contributory negligence on the part of the plaintiff.

No. 7822.

THE HOWE MACHINE COMPANY v. BROWN ET AL.

PROMISSORY NOTE.—Answer.—Fraudulent Representations.—To enable a defendant to defeat an action against him on a promissory note, on account of fraudulent representations inducing him to sign it, he must show that the representations were concerning some material matter, that they were false, that they were such as he had a right to rely upon, that he did rely upon them, and that he was deceived thereby.

SAME.—Fraud.—Allegations and Proof.—The facts necessary to establish fraud must be alleged and proved by the party who relies upon it.

SAME.—Surety.—Pleading.—Defalcation.—In such case, an answer, that one of the defendants was surety on the bond of his brother as agent of plaintiff, that, after the termination of the period for which it was given, he was continued as agent and became a defaulter, that agents of the plaintiff represented to the defendants that his defalcation occurred while the bond was in force, and that they would at once commence suit upon the bond and criminal proceedings against the principal, must clearly show that he was not guilty of any defalcation while the defendant was liable as his surety, and that the defendants relied upon the alleged representations of liability.

SAME.—Inducements.—In such case, an allegation, that the notes were executed "to avoid litigation and the shame of a criminal prosecution against

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their brother, and in consequence of fear of the same," implies that other inducements than the supposed liability of the defendant as surety entered into the transaction.

From the Cass Superior Court.

D. C. Justice, for appellant.

D. B. McConnell, for appellees.

NIBLACK, J.—Action by the Howe Machine Company against Jasper N. Brown, Francis M. Brown and Samuel S. Brown, on two promissory notes.

Jasper N. Brown answered separately in two paragraphs, upon which issue was joined.

Francis M. Brown and Samuel S. Brown jointly answered:

First. A want of consideration for the execution of the notes.

Second. Substantially as follows:

For further answer, they say that they separately, each for himself, admit the execution of the notes in suit, but that the plaintiff should not recover in this suit for the following reasons: The defendant Francis M. Brown was at one time the surety and liable upon the bond of the defendant Jasper N. Brown, and one Simon Lepinsky, as the agents of the plaintiff for the sale of sewing machines manufactured by it; that said liability began on the 6th day of April, 1875, and terminated by the dissolution of the partnership of the said Jasper N. Brown and Simon Lepinsky on the 10th day of September, 1875; that, after the said dissolution, the plaintiff, without the knowledge of the said Francis M. Brown, continued the said Jasper N. Brown as its agent, and he, subsequent to the said dissolution, became and was a defaulter for a large sum; that the said Jasper N. Brown resided in another county, at a distance from the residence of the said Francis M. Brown; that the plaintiff, by its agents, after said defalcation, then came to the said Francis M. Brown, and falsely and fraudulently represented that the said defalcation occurred during the time said bond was in force, and grew out of the credit given and trust reposed in the said Jasper N. Brown and his said partner, and that

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he was liable on said bond for said defalcation, and in aid of said false pretences, and for the purpose of inducing him to become responsible for the amount of said defalcation, exhibited the notes of the said Jasper, and, claiming that he admitted the same, threatened that in case he, the said Francis M. Brown, did not sign said notes with said Jasper, and procure another person who was responsible to sign with him as his security, they, said agents, would at once bring suit on said bond on account of said defalcation; and defendants aver that this was at the house of said Francis, in the country, eight miles from town or any place where he could obtain legal advice; that he requested the plaintiff's agents to delay action until he could obtain advice or communicate with said Jasper N. Brown in relation to the facts, and they refused to do so, threatening that they would commence suit upon said bond at once, and further, that they would at once commence criminal proceedings against the said Jasper N. Brown, who is a brother of these defendants; that, relying upon the truth of the statements of the plaintiff's agents, and being in ignorance of the truth in relation thereto, and without any means of ascertaining the same, to avoid litigation and the shame of a criminal prosecution against their brother, and in consequence of fear of the same, induced by the said false and fraudulent representations of the plaintiff's agents, he consented to sign said notes, and procured the defendant Samuel S. Brown to sign the same with him as his security, it being then and there declared and understood that the said Jasper N. Brown was wholly worthless and insolvent and not to be expected to pay said notes or either of them when they became due. Wherefore defendants say said notes are wholly void.

Francis M. Brown, also, answered separately, setting up similar representations by which he was induced to sign the notes, averring such representations to have been false.

Demurrers were overruled to the second paragraph of the joint answer of Francis M. Brown and Samuel S. Brown, and the separate answer of the said Francis.

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Issue ; trial by jury ; verdict for the plaintiff against Jasper N. Brown and in favor of the other defendants, Francis M. Brown and Samuel S. Brown. Judgment in accordance with the verdict.

The plaintiff has appealed, and argues that the demurrer ought to have been sustained to the second paragraph of the answer of the said Francis M. and Samuel S. Brown, set out as above.

To enable a defendant to defeat an action like this on account of fraudulent representations, it must be shown that the representations were concerning some material matter, that they were false, that they were such as he had a right to rely upon, that he did rely upon them and was deceived thereby. 6 Wait's Actions and Defenses, 816 ; *Frenzel v. Miller*, 37 Ind. 1 ; *Jones v. Hathaway*, 77 Ind. 14 ; *Elsass v. The Moore's Hill, etc., Institute*, 77 Ind. 72.

The facts necessary to establish fraud must be averred and proved by the party who alleges and relies upon it. Wait, *supra*, 820.

With these well recognized principles in view, we think it was not made sufficiently to appear by the paragraph of answer complained of, that Jasper N. Brown was not guilty of any defalcation while he was in partnership with Lepinsky, and that Francis M. Brown was not in any manner liable to the plaintiff as the surety of the said Jasper.

Nor was it sufficiently averred that the defendants Francis M. Brown and Samuel S. Brown relied upon the alleged representations, as to the liability of the said Francis as the surety of the said Jasper, in the execution of the notes.

The allegation that the notes were executed "to avoid litigation and the shame of a criminal prosecution against their brother, and in consequence of fear of the same," fairly implied, that inducements other than the supposed liability of the said Francis entered into the transaction.

The paragraph of answer under discussion appears to us, therefore, to have been bad upon demurrer.

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The plaintiff also argues that the demurrer ought to have been sustained to the separate answer of Francis M. Brown, but as, for the reasons given, the judgment will have to be reversed, we have not considered the objections urged to that answer.

The judgment, as to all the defendants below, is reversed, at the costs of the appellees, and the cause remanded for further proceedings.

No. 8189.

RODENBARGER v. BRAMBLETT.

CONTRACT OF ASSUMPTION.—*Principal and Surety.—Subrogation.—Demand.—*

Promise.—B. became surety for W. and another upon a note for the price of a horse. W. afterwards sold his half interest in the horse to R., who, in consideration thereof, "agreed with W. to assume and pay off the note." B. was compelled by suit to pay the note.

Held, in an action by B. against R., that he could recover the amount so paid.

Held, also, that R.'s promise to W. inured to the benefit of B., who, having discharged the debt, was entitled to be subrogated to the right of action which W. would have had against R. if he had paid it himself.

Held, also, that the holder of the note might have sued R. upon his promise, but the fact that he chose to sue the makers of the note, and not to accept R.'s promise, did not deprive B. of the benefit of the promise.

Held, also, that after taking judgment against the makers of the note the holder might still have accepted and sued upon R.'s promise, and, by paying the judgment, B. became subrogated to this right of the holder.

Held, also, that no demand by B. was necessary before bringing the action.

*PROMISE.—Privity of Contract.—Agency.—Trusteeship.—Demand.—*Where, upon a consideration received, there is an explicit and unqualified promise to pay a specific sum, to become due at a known or stated time, to or for the benefit of a third person named, no case of agency or trusteeship arises which entitles the promisor to wait for a formal demand before discharging the promise, but it is, as to him, a purely legal obligation, and equity goes no further than to give the right of action to one who, otherwise, for want of privity of contract, could not sue. *Miller v. Billingsly*, 41 Ind. 489, and *Durham v. Bischof*, 47 Ind. 211, distinguished.

From the Clay Circuit Court.

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S. D. Coffey, W. W. Carter and C. E. Matson, for appellant.
S. W. Curtis and E. S. Holliday, for appellee.

WOODS, J.—The error assigned is, that the complaint does not state facts sufficient to constitute a cause of action against the appellant.

The complaint shows that the appellee became surety for Noah Rodenbarger and one Witty, upon a promissory note made by them to William P. Swain, for the price of a horse, sold and delivered to them by Swain; that Witty afterward sold his half interest in the horse to the appellant, John Rodenbarger, who, in consideration therefor, “agreed to and with said Witty to assume and pay off said note to said Swain;” that Swain endorsed the note to George W. Jacks, who brought suit thereon against the payees [makers?] thereof and this plaintiff, who was compelled to and did pay the whole amount of the note, interest and costs, to wit, \$300.

The said Noah Rodenbarger was also made a defendant, but died, and the case was prosecuted to final judgment against the appellant alone.

Counsel for the appellant advance two propositions, on which they claim that the complaint is defective. First, that, on the facts stated, the plaintiff has no ground for an action; and, second, that, if he can have an action at all, it can be only after a demand made.

Under the first proposition, it is insisted that the promise of the appellant, made to Witty, might have been accepted by the holder of the note, under the doctrine of *Bird v. Lanius*, 7 Ind. 615, *Day v. Patterson*, 18 Ind. 114, *Devol v. McIntosh*, 23 Ind. 529, *Cross v. Truesdale*, 28 Ind. 44, and *Davis v. Calloway*, 30 Ind. 112; but that, the holder of the note having failed to accept the promise, and having sued the makers of the note, there is no right of action against the appellant to which the appellee can claim to be subrogated.

We do not assent to this conclusion. The obligation of the defendants' promise to pay the note, resting, as it did, on

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an executed consideration, did not depend on an acceptance of the promise by the holder of the note, who was at liberty to accept it or not, as he chose; and, though he did not accept it, it was still a binding promise in favor of Witty, to whom it was made, and through him in favor of his surety, the appellee. The performance of the promise must have inured to the benefit of the appellee, by discharging his liability, and equity and good conscience concur in requiring that he be allowed to enforce the performance. See *Mathews v. Ritenour*, 31 Ind. 31; *Crim v. Fitch*, 53 Ind. 214; *Josselyn v. Edwards*, 57 Ind. 212.

We should reach the same result, even if it were held that the appellee had only such right as was derived from the holder of the note, under the doctrine of subrogation to, or equitable assignment of, the creditor's rights and remedies. Until the payment was made by the appellee, it is clear that the holder of the note had a right to resort to the liability assumed by the appellant. He did not waive that right by bringing suit against the makers of the note. He might have sued the appellant in the same action with the makers—*Davis v. Hardy* 76 Ind. 272; *McDill v. Gunn*, 43 Ind. 315—and, as the obligation of the appellant is several and not joint with that of the makers of the note, it is not merged in the judgment taken against the latter, and consequently, after taking that judgment, and before its payment by the appellee, Jacks might have sued the appellant on his promise; and to this right the appellee, by virtue of his payment of the judgment, became subrogated.

The question remains, whether a demand was necessary before the bringing of the suit. That it was, is claimed on the authority of *Miller v. Billingsly*, 41 Ind. 489, and *Durham v. Bischof*, 47 Ind. 211. In the latter case, it was held that a demand was necessary, but the contract was essentially different from the one now in suit. This contract is to pay a specific debt, evidenced by a note which became due at a stated time. In that case, the assignee of a stock of goods and other

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property, in consideration of the sale and assignment of the goods and property, agreed, "by compromise or otherwise, to settle all debts owing by them (the assignors); or if such settlement (should) be impracticable, that the proceedings in bankruptcy now (then) pending (should) be prosecuted so as to effect a final adjustment of their business," etc. The suit was by creditors, and it is manifestly just and proper that a demand should have been required in such a case. The defendant was essentially a trustee, and had made no absolute and specific promise to pay the claim which was sued on.

In *Miller v. Billingsly*, the question of demand is neither decided nor considered, but only the general right of a third person, for whose benefit a contract is made, to sue thereon, though not privy to it. After citing a number of cases in support of the right of action in such a case, the court says: "In the above cases, the person making the promise, or receiving the money or article, is treated as a trustee for the person for whose benefit the promise was made, or for whose use the money or article of value was received;" and upon this expression the appellant rests his argument, insisting that a trustee can not be in the wrong until he has refused to comply with the trust, and can not be said to have refused, if no demand has been made upon him for performance.

It may be that the promisor, in such a case, is, in a sense, to be regarded as a trustee for the one for whose benefit the promise is made. Where specific property or money is delivered and received for the use of a third person, there is clearly an actual trusteeship, and so there may be in other supposable cases, such as *Durham v. Bischof*, *supra*, and in such cases a demand may well be said to be necessary; but in cases such as the one in hand, where, upon a consideration received, there is an explicit and unqualified promise to pay a specific sum to become due at a known or stated time, to or for the benefit of a third person named, it is not a case of agency or trusteeship which entitles the promisor to wait for a formal demand before discharging the promise. It is, as to

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him, a purely legal obligation, and equitable principles play no further part than to give the right of action to the party to whose benefit the promise enures, and who, for want of privity, can not sue at law. See *Tinkler v. Swaynie*, 71 Ind. 562.

Among the numerous cases decided and reported since *Bird v. Lanius*, *supra*, was decided, wherein the action was prosecuted by the third person for whose benefit the promise was made, and the promise itself was explicit, we have found none wherein a demand was averred or deemed necessary. Besides the cases already cited, and those cited in *Miller v. Billingsly*, see *Haggerty v. Johnston*, 48 Ind. 41; *Crawford v. King*, 54 Ind. 6; *Campbell v. Patterson*, 58 Ind. 66; *Hoffman v. Risk*, 58 Ind. 113; *Whitesell v. Heiney*, 58 Ind. 108; *Fleming v. Easter*, 60 Ind. 399; *Scarry v. Eldridge*, 63 Ind. 44; *Vanness v. Dubois*, 64 Ind. 338; *Kester v. Hulman*, 65 Ind. 100; *Young v. Schlosser*, 65 Ind. 225; *Rhodes v. Matthews*, 67 Ind. 131; *Fisher v. Wilmoth*, 68 Ind. 449; *Smith v. Ostermeyer*, 68 Ind. 432; *Risk v. Hoffman*, 69 Ind. 137; *Logan v. Smith*, 70 Ind. 597; *Medsker v. Richardson*, 72 Ind. 323.

Judgment affirmed, with costs.

No. 8473.

JONES v. THE STATE, EX REL. DELLINGER.

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SUPREME COURT.—Practice.—Instructions.—Harmless Error.—Instructions to the jury which assume the truth of facts necessary to make out the case, when there is really no dispute about such facts, and no conflict in the evidence concerning them, is a harmless error, and not available in the Supreme Court.

BASTARDY.—Instruction to Jury.—Harmless Error.—An instruction to the jury in bastardy, that "there is but one question for you to determine in this case, and that is, is the defendant the father of the bastard child?" is erroneous; but in a case where that is the only fact really in contro-

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versy, and all other necessary facts are established by sufficient evidence, without conflict, the error is harmless, and not available.

NEW TRIAL.—*Newly Discovered Evidence.*—Newly discovered evidence, not cumulative, which, in connection with the evidence given on the trial, would probably change the result, entitles a party to a new trial.

From the Tipton Circuit Court.

J. Jones and *D. Waugh*, for appellant.

FRANKLIN, C.—This was a prosecution for bastardy, commenced by one Elizabeth Dellinger against the appellant. The proceeding was commenced prior to the birth of the child. After the preliminary examination before the justice of the peace the relatrix died, and the child (Hada Dellinger) was substituted as relatrix, and in whose name the subsequent proceedings were had, Ruth Dellinger being appointed guardian *ad litem* for the infant. The appellant was not arrested nor present before the justice of the peace. He voluntarily appeared and pleaded not guilty before the circuit court.

A trial by jury resulted in a verdict that the defendant was the father of the child. A motion by the defendant for a new trial being overruled and an exception reserved, the court rendered judgment upon the verdict.

The first, second and third errors assigned, in relation to the admission upon the trial of improper testimony and instructions to the jury, might be good reasons in a motion for a new trial, but are not proper in the assignment of errors.

The fifth error assigned is the overruling of the motion for a new trial, and the eleventh reason is based upon the instructions of the court to the jury. The last clause in the first is complained of, and reads as follows: "Some time after bringing the suit, the mother died, leaving the child alive, and said child is still living."

Also the second, which reads: "By our statute the death of the mother shall not abate the suit, if the child be still living; and, upon the suggestion of the death of the mother, the name of the child shall be substituted as the relator in the case, and the suit shall be prosecuted for the benefit of the

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child. This has been done in this case, and Hada E. Dellinger, the infant child, is now the relator."

Also the third, which reads: "Before this court has jurisdiction of such cases, there must be a complaint filed before a justice of the peace, an examination of the mother under oath, which examination must be reduced to writing, and these proceedings certified to this court. These steps have been taken before the death of the mother, Elizabeth Dellinger."

Also the fifth, which reads: "There is but one question for you to determine in this case, and that is, 'Is the defendant the father of the bastard child?'"

The objection to these instructions is, that they assume facts to exist which were required to be proved; and that it was for the jury, under the defendant's denial, to determine whether they were proved, and not for the court to usurp the province of the jury and determine such facts for them. In order to make out the case, the plaintiff had to prove that she had been delivered of a bastard child, that she was dead, and that the child was living. These formal facts were as necessary to be proved as the paternity of the child. And an instruction to the jury that there was but one question for it to determine, and that was, "Is the defendant the father of the bastard child?" was fixing too narrow limits to the duties of the jury. But if error it was a harmless one, there being no controversy about the formal facts, and no conflict in the testimony in relation to them.

The tenth reason for a new trial was based upon newly discovered evidence.

The relatrix, in her examination before the justice of the peace, stated that the child was begotten the last of December, 1878. The evidence shows that the child was born the 26th of August, 1879. The defendant testified that he had never had any sexual intercourse with Elizabeth Dellinger until the latter part of February, 1879. The proof tended strongly to show that the child at the time of its birth was a well devel-

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oped and matured child, and had every appearance of having gone the full period of gestation. The trial was had November 26th, 1879. The defendant, in his affidavit in relation to the newly discovered evidence, states that since the trial, on the 3d day of December, 1879, he discovered that he could prove by two witnesses living in Kokomo, Howard county, Ind., giving their names, that the relatrix had spent two weeks of the last of November, 1878, at a hotel in said city of Kokomo, and while there a strange young man, boarding at the same hotel, went into her bed-room and remained with said relatrix the greater portion of one night, and that she had to be discharged from the hotel on account of her lewd conduct with the male guests. The affidavits of the two witnesses, stating these facts, are filed with his in support thereof. This testimony not being merely cumulative, taken in connection with other facts proved, would tend strongly to show that some other person than the defendant was probably the father of the child, and to demonstrate the uncertainty of the practice of swearing to the time of the conception and paternity of a child before its birth.

We think the foregoing reason shows sufficient cause for the granting of a new trial, without noticing the other nine reasons stated in the motion for a new trial; they may not again occur in a subsequent trial of the cause, and we do not think it profitable to extend this opinion by discussing them.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and the same is, in all things reversed, at appellee's costs, and that the cause be remanded with instructions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

Turpie v. Knowles *et al.*

No. 8491.

TURPIE v. KNOWLES ET AL.

PRACTICE.—Parties as Witnesses.—Motion to Set Aside Submission and Finding.—

Where a party moves the court to set aside the submission and finding in a cause, upon the ground of his own absence, as a material and competent witness, he must show by affidavit the facts which made his absence necessary at the time of the trial.

From the White Circuit Court.

A. W. Reynolds and *E. W. Sellers*, for appellant.

H. P. Owens, for appellees.

Howk, J.—This was a suit by the appellees, as the payees, against the appellant, as the maker, of a certain promissory note, alleged to be due and wholly unpaid. The appellant answered in three paragraphs, but afterwards withdrew the third paragraph. The first paragraph was a general denial of the complaint, and the second paragraph was a plea of payment in full before the commencement of the action. The appellees replied by a general denial of the second paragraph of answer. The issues joined were tried by the court, and a finding was made for the appellees for the amount of the note and interest. Thereupon the appellant moved the court, upon an affidavit filed, to set aside the submission of the cause, which motion was overruled, and to this ruling he excepted. Judgment was then rendered for the appellee, upon and in accordance with the finding of the court.

The only question for the decision of this court, presented and discussed by the appellant's counsel in their brief of this cause, is this: Did the circuit court err in overruling the appellant's motion to set aside the submission of this cause and the finding therein?

The motion was founded upon, and supported by, the affidavit of the appellant's brother, William Turpie. In his affidavit, the said William Turpie stated, in substance, that, since the commencement of the June term, 1879, of the court below,

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the affiant had been, off and on, at his home in Bradford, in White county, in this State, and the appellant, James H. Turpie, was then in Ohio; that affiant had expected to hear from the appellant's counsel when this cause, as well as other cases on the docket, would be set for trial, and immediately notify the appellant, who was to come to the court below to attend the trial of this case and other cases mentioned; that affiant had been informed by John H. Wallace, Esq., the appellant's attorney, that, on the third day of that term, he sent a letter to the appellant, addressed to Bradford, White county, Indiana, notifying him of the day for trial; that the affiant had never received that letter, and he knew that the appellant had never received the same, for the reason that he had not been at home since that term of court commenced, but relied on the affiant to notify him when the case would be set for trial; that, before the commencement of that term of the court, the affiant and the appellant had an arrangement with said Wallace, their attorney, that he was to get the case set for trial, and notify them at Bradford of the day on which this case would be set for trial, and, if possible, was to get this case set down for trial in the third week of said term; that the appellant had a good defence in this suit; that the note sued on in this case, and the one sued on in the case of Quean & Co. against him, had been fully satisfied before the commencement of the suits in said court, and were fully satisfied in the following manner: The appellant held a note, executed by one Brant to him and the affiant, for \$1,000, secured by a mortgage on certain real estate in Huntington county, Indiana, which was well worth the sum of \$1,000; that the appellees, in connection with Quean & Co., took said note secured by mortgage, and agreed to foreclose said mortgage, and bid in the real estate at the full amount of \$1,000 and interest, and receive the same in full satisfaction of the note sued on in this case, and of the one on which Quean & Co. had obtained judgment, and that the note sued on, and the one held by Quean & Co., were fully satisfied before the commencement of this suit; that the ap-

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pellant would be able to prove all these facts by letters received from the appellees, and by one witness in said Huntington county, as well as by himself and the affiant; that the first time the affiant knew that this cause was set for trial, or would be called on yesterday, was at about one o'clock on yesterday, when he received a dispatch from said Wallace to that effect; that at that time affiant was in Bradford, in said county, and he came to the court below as soon as he could, and arrived there at 2 o'clock and 23 minutes, but, at that time, judgment had been taken in this cause; and that, if affiant had known of the time when said cases were set for trial, he would have notified the appellant, and he would have been present and ready for trial.

The appellant's motion to set aside the submission of this cause, and the finding therein, was peculiarly addressed to the sound discretion of the trial court. In such a case an absolute abuse of the discretion of the court must be clearly shown by the affidavits filed in support of the motion, before this court would be authorized to revise or reverse the decision below. We need hardly say that no such showing has been made in the case now before us. We have given the substance of the only affidavit filed in support of the appellant's motion; and it is manifest therefrom that he had made no preparation whatever for the trial of this cause. He had asked his attorney to have the case set down for trial in the third week of the term, and it was set for the third Thursday of the term; but the appellant was then in Ohio. He could prove his payment of the note in suit, by letters received from the appellees; but it does not appear that he had placed these letters in his attorney's hands, in anticipation of, or in readiness for, the trial of the cause. He could prove the facts of his defence by his brother, William Turpie, and by one witness in Huntington county, whose name is not given; but it does not appear that he had taken any legal means to procure the attendance of either of these witnesses on the day set for the trial of the case, or on any other day. It is stated in the

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affidavit that the facts constituting the alleged defence could have been proved by the appellant's own evidence; but he was absent in Ohio, and no cause, reason or excuse is assigned, or is attempted to be assigned, for his absence from the State, at the time of the trial of this cause.

Upon the point now under consideration, in delivering the opinion of the court in *Yater v. Mullen*, 24 Ind. 277, it was well said by FRAZER, J.: "Public or social obligations, or the demands of private business even, might appear to be, if stated, so urgent and imperative as to justify a witness in being absent at the commencement of a trial which he is subpoenaed to attend. But without such excuse, the witness' duty is to be present before the trial begins, and, if he fails, he is in contempt, and it is not sufficient that he has intended and arranged to be present in time to testify. To so hold, would be to put every suitor's cause in peril, or drive him to seek delay, for he could not know that he could safely go to trial. Now that parties can be witnesses, there is no rule, consistent with that speedy administration of justice which the constitution requires, short of holding such parties, at their peril, to the same prompt attendance to give their evidence which the law has, time out of mind, required of other witnesses. And upon their application to be relieved from the consequences of their absence, it is surely not a harsh requirement that they shall show to the court the facts which rendered it necessary for them to be absent when the trial began."

In the case at bar, no attempt even was made, by affidavit or otherwise, to show to the court the facts which rendered it necessary for the appellant to be absent during the term of the court when this cause was tried. The showing made, therefore, was clearly insufficient, and the court committed no error in overruling the appellant's motion to set aside the submission of this cause and the finding of the court therein. *Davis v. Luark*, 34 Ind. 403; *Welcome v. Boswell*, 54 Ind. 297.

The judgment is affirmed, at the appellant's costs.

Hillegass, Adm'r, v. Bender.

No. 8402.

HILLEGASS, ADM'R, v. BENDER.

ATTORNEY.—*Circuit Court.—Duties of Clerk.—Money.—Judgment.—Payment.*—Prior to the enactment of the act of March 9th, 1875, 2 R. S. 1876, p. 17, every attorney was bound to know that the clerks of the several circuit courts throughout this State were not authorized to receive money in payment of judgments, dues and demands of record in their respective offices.

SAME.—In such case, payment of a judgment must be made to the judgment creditor, or to some one duly authorized to act for him.

SAME.—*Power and Liability.*—The general power and liability of an attorney for a defendant cease upon the entry of a judgment finally terminating the litigation, and do not include the payment of the judgment, although he be furnished with money for the purpose.

SAME.—*Agent.*—If an attorney for a judgment defendant, prior to March 9th, 1875, received money with which to pay the judgment, and paid it to the clerk of the court, acting in good faith, and his client or principal, with full knowledge, acquiesced in his act, he was not liable as attorney, or agent, for its loss by the insolvency and death of the clerk.

SAME.—In such case, to fasten upon him the liability of an attorney, for ignorance of the law, a consultation touching the question of law, and a special employment to make the payment in pursuance of his negligent advice, must be shown.

From the Allen Circuit Court.

R. S. Robertson and J. B. Harper, for appellant.

L. M. Ninde and T. E. Ellison, for appellee.

ELLIOTT, C. J.—Samuel Bender, the appellee, was sued by Eliza Wright, and judgment rendered against him on the 25th day of June, 1872, by the Allen Circuit Court. Appellant's intestate was the attorney of the appellee in the action. Eighteen months after the judgment was rendered, money was placed in the hands of the intestate, by appellee, for the purpose of paying the judgment. The money was paid to William S. Edsall, then the clerk of Allen county, and a proper entry of satisfaction was made upon the judgment docket by Edsall. Appellee knew that the money had been paid to the

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clerk, and made no objection when informed of that fact, nor did he at any time object to the mode of payment. He knew, also, that the money had not been paid to the judgment plaintiff. Edsall continued in office nine or ten months after the payment of the money to him, and died insolvent in November, 1876. No demand was made upon Edsall during his lifetime, but demand was made upon his administrator.

Appellee made claim against the estate represented by the appellant, and obtained judgment, from which this appeal is prosecuted.

Payment to the clerk of the Allen Circuit Court was not a satisfaction of the judgment against the appellee, nor was it payment to the judgment creditor. Under the statute in force in 1874, the clerk was not authorized to receive money due upon a judgment. This was so ruled in *Hays v. Boyer*, 59 Ind. 341. A vigorous assault is made upon this case, and we are earnestly asked to overrule it. The arguments and authorities adduced are not of such strength as to incline us to even question its soundness, much less to move us from the rule of *stare decisis*. Substantially the same doctrine had been declared in an earlier case, that of *Carey v. State, ex rel.*, 34 Ind. 105, for it was there clearly stated that a clerk had no right to receive money unless so directed by order of court, or so authorized by statute. Other cases had stated the question, but had not decided it. *Prather v. State Bank*, 3 Ind. 356; *Armstrong v. Scotten*, 29 Ind. 495; *Jenkins v. Lemonds*, 29 Ind. 294; *Carey v. State, ex rel.*, 34 Ind. 105; *Crews v. Ross*, 44 Ind. 481.

A lawyer is liable for a negligent omission to perform a plain duty. Upon this ground rests the decision in *Stott v. Harrison*, 73 Ind. 17. In that case the duty was a plain one; there were no doubtful questions of law for decision, nor any conflicting mode of procedure to embarrass or mislead. A lawyer is not liable for every mistake. He is not liable for a mistake committed in matters where the law is doubtful and uncertain. "God forbid," said ABBOTT, C. J., "that it should

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be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law." Nor is the lawyer bound to bring to the practice of his profession the highest skill and learning. He is bound to possess and exercise competent skill, and if he undertakes the management of a law affair, and neither possesses nor exercises reasonable knowledge and skill, he is liable for all loss which his lack of capacity or negligence may bring upon his client. "What an attorney does profess and undertake, and all that he professes and undertakes, is, first, that he possesses the knowledge and skill common to members of his profession, and, second, that he will exercise, in his client's business, an ordinary and reasonable degree of attention, prudence, and skill." *Shearman & Redf. Neg.*, section 211. *Reilly v. Cavanaugh*, 29 Ind. 435; *Cav-erly v. McOwen*, 123 Mass. 574. The man who professes to act as a lawyer must be acquainted with the settled rules of law and the practice of the courts prevailing in the locality wherein he practices. "For this purpose," to borrow the language of a late writer, "there must be a familiarity with the adjudicated local law as well as the statute law bearing on the particular point; and there must be a knowledge of the legal machinery necessary for the application of this law. To undertake the management of a case without such knowledge is negligence which makes the lawyer liable for any loss which his client may thereby incur." *Whart. Negligence*, section 749. Another author thus states the rule: "The law requires an attorney to be acquainted with the practice of his court, with the ordinary rules of pleading and evidence, the existence of statutes and rules of court, and in cases free from doubt, with their construction also." *Weeks on Attorneys*, 474, section 285.

It is the duty of a lawyer to know whether public matters, such as the duties of the officers connected with the court in which he practices, are regulated by statute. A lawyer who does not know whether the duties of the clerk of the court in which his professional duties are performed are, or are not, de-

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fined by statute, can not be deemed to possess competent skill. It is a lawyer's duty to know the elementary rules of law upon familiar matters of practice, as well as the settled rules governing matters which spring out of the ordinary transactions of every-day life, and which are of frequent application. A rudimental knowledge of the law would have acquainted the appellant's intestate with the elementary rule, that payment must be made to the creditor, or to some one duly authorized to act for him. A rule so long settled and so familiar ought to be known to all who assume the character of lawyers. A knowledge of the statutes would have shown the intestate that there was in them no provision changing the familiar and long established rule. It must be held that if the intestate was the appellee's attorney when he paid the money to Edsall, and paid it as his attorney, a right of action accrued to the appellee, because competent skill was either not possessed, or was not exercised.

Was the intestate appellee's attorney at the time the money was paid to Edsall? The evidence does not show the specific terms of the employment. The testimony of the only witness introduced by the appellee is thus given in the bill of exceptions: "I am a son of the plaintiff. I paid Joseph D. Hillegass, since deceased, \$50 in 1873, and \$220 in 1874, to be applied on a judgment in favor of Eliza Wright against my father. I paid it for my father. Hillegass was my father's attorney in the defence of the suit, and deducted \$19.40 for fees." We do not think that this shows that the deceased was, at the time the money was paid to him, and by him to the clerk, acting as the attorney of the appellee. The fact, that Hillegass was the attorney "in the defence of the suit," did not make him such in the payment to the clerk of the money placed in his hands. The general power of an attorney for a defendant ceases upon the entry of a judgment, finally terminating the litigation. *Weeks on Attorneys*, section 248; *Bartholomew v. Langsdale*, 35 Ind. 278. The general rule is, that when the duty ends the liability ceases. This

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ought to be so in such a case as the present, where the employment was to defend a pending action. It is no part of the duty of a defendant's attorney, in the capacity of attorney, to pay judgments entered against his client, although furnished with the money for that purpose. It may be, in such a case, his duty as an agent, to pay the money to the creditor, but ordinarily attorneys are not bound to hunt up and pay judgment creditors. It can not be assumed, from the mere fact that money is supplied for that purpose, that, in making payment, he acts in the capacity of an attorney. There is nothing at all to show that Hillegass was employed to act as an attorney in making payment, or that his professional judgment was solicited upon the mode of payment. If he had been consulted upon that subject as an attorney, if in any way his attention was directed to the fact that he was consulted as an attorney, as to whom and how the payment should be made, a different case would be presented. There is nothing, however, from which it can be inferred that his employment as an attorney extended beyond the defence of the action prosecuted against his client.

The utmost effect that can fairly be given the evidence is, that it shows that the money was received and paid out by the appellant's intestate as the agent of the appellee. The case must, therefore, be considered as one against an agent, and not as one against an attorney. So considered, the evidence does not entitle the appellee to a recovery. The testimony of the witness to whom we have already referred, given upon cross-examination, was as follows: "Sometime after the money was paid to Hillegass, Mrs. Wright sent over word that she wanted the money, and we sent back word that the judgment was paid. They came back again, saying it was not paid, and we told them it was. I went to Fort Wayne to see Hillegass. He told me it was paid over to the clerk; said he was busy then, but I could go over to the clerk's office and see. I did not go then. The next time I went to town I again told Hillegass that Mrs. Wright claimed that the judg-

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ment was not paid yet. He went over with me to the clerk's office, and showed me the clerk's receipt. My father did not object when I told him about it when I went home. It was soon after I paid the money to Hillegass that I saw the clerk." This evidence shows that the agent acted in entire good faith, and that the principal, with full knowledge, acquiesced in the agent's act. Under such circumstances, the principal can not hold the agent responsible. Especially should this be so where, as here, the principal is guilty of negligence after having been directly put upon inquiry. When the appellee was informed, as he was at least twice, that the judgment creditor had not received the money, he ought to have taken some steps to see that it reached her.

Applying the law to the facts, it must be held that the court erred in denying appellant's motion for a new trial.

Judgment reversed.

WORDEN and WOODS, JJ., dissent.

No. 7891.

COPPLE ET UX. v. LEE.

REPLEVIN.—*Justice of the Peace.*—*Jurisdiction.*—*Statute Construed.*—*Cases Overruled.*—Under the provisions of sec. 9 of the act concerning justices of the peace, 2 R. S. 1876, p. 605, an action of replevin before a justice must be brought either in the township in which the property was taken, or in which it is detained. *Beddinger's Adm'r v. Jocelyn*, 18 Ind. 325, and *Test v. Small*, 21 Ind. 127, overruled.

From the Shelby Circuit Court.

A. Blair, E. P. Ferris and W. W. Spencer, for appellants.

E. K. Adams, for appellee.

NIBLACK, J.—This was an action of replevin by Nicholas Copple and Cynthia Copple, his wife, in right of the said Cynthia, against Howard Lee, for the recovery of a bay horse of

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the value of \$50, and a bay mare of the value of \$40, and was commenced before a justice of the peace of Addison township, in Shelby county.

The defendant answered in abatement, that at the time of the commencement of this suit he was, as he still continued to be, a resident of Sugar Creek township, in said county of Shelby; that the property in suit had not been taken or detained by him in said township of Addison, but that said property had been taken and detained, and was then held by him, in Sugar Creek township aforesaid; that this suit had not been commenced by a *capias ad respondendum*, or in a case where there was no justice of the peace in said Sugar Creek township competent to try the same; that, at the time of the commencement of this suit, there were two duly qualified and acting justices of the peace in and for said Sugar Creek township, giving the names of such justices, both of whom were fully competent to try the cause.

After judgment before the justice, the cause was appealed to the circuit court, where the plaintiffs demurred to the answer in abatement, but their demurrer was overruled.

Issue being joined, the court found in favor of the defendant upon the facts pleaded in abatement as above, and judgment that action abate was rendered accordingly.

Error is assigned upon the overruling of the demurrer to the answer in abatement.

The question presented by this assignment of error is one which, in some form, has been heretofore several times before this court, and concerning which there appears to have been some conflict in the decisions of this court. We will, therefore, to some extent, consider the question, as now presented, as an original question here.

Section 9 of the act defining the powers and duties of justices of the peace in civil cases provides, that "The jurisdiction of justices in civil cases, shall, unless otherwise provided by law, be limited to their townships respectively." 2 R. S. 1876, p. 605.

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Section 13 of the same act declares that "No person who is a resident of any township in this State shall be sued out of said township, except as specified in the above mentioned acts, unless said suit is commenced by a *capias ad respondendum*, or when there shall be no justice competent to act in such township."

Section 71 of the same act further enacts that where a plaintiff files his verified complaint, alleging that his personal property has been wrongfully taken, or is unlawfully detained by some other person, specifically describing such property, the justice shall issue to some constable of the county his writ, commanding him to take the property described and deliver it forthwith to such plaintiff, and that he summon said defendant to appear, at a time and place therein named, before such justice, to answer such complaint.

Section 15 of the same act also provides that "Suits for trespass to real and personal property may be brought either in the township where the defendant resides, or where the trespass was committed, and process served throughout the county."

Taking section 71 in connection with sections 9 and 13 only, we think it would mean that an action of replevin could only be brought in the township in which the defendant resides, the provision that the writ shall be issued to some constable of the county having reference only to a more convenient and efficient method of obtaining service of the writ, without enlarging the territorial jurisdiction of the justice issuing such writ.

But treating the action of replevin as being analogous to, and in the nature of, an action of trespass to personal property, and construing section 71, also, in connection with section 15, lastly above set out, as this court did, and as it seems to us correctly, in the case of *Jocelyn v. Barrett*, 18 Ind. 128, an action of replevin may also be brought in the township in which the property was taken or is detained, and to this extent only do we regard the territorial jurisdiction of a jus-

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tice of the peace as being greater in an action of replevin than in other and ordinary civil actions.

We are, therefore, of the opinion that the court below did not err in overruling the demurrer to the answer in abatement filed by the appellee. See, also, *Beddinger's Adm'r v. Jocelyn*, 18 Ind. 325; *Test v. Small*, 21 Ind. 127; *Nesbit v. Long*, 37 Ind. 300.

So far as any of these last-named cases are in conflict with the conclusion we have reached in this case, they must be considered as overruled.

It is also objected that the answer in abatement was not filed in time, but the record made of the proceedings below does not sustain that objection.

The judgment is affirmed, with costs.

No. 9876.

CASKEY v. CITY OF GREENSBURGH ET AL.

INJUNCTION.—*Proceedings to Open Street in City.—Damages.—Presumption.*—

The act of March 17th, 1875, forbids an injunction against the opening of a street in a city, if damages have been assessed and tendered; and, until the contrary appears, it will be presumed that the damages were assessed and tendered.

SAME.—*City Commissioners.—Notice.—Assessment.*—It would not be cause for injunction, that the oaths of the city commissioners were not endorsed on their certificates of appointment according to law; nor that the commissioners did not take the oath of office required by law; nor that the plaintiffs did not have notice of an adjourned meeting of said commissioners, at which the assessments were made.

SAME.—*Pleading.—Notice of Meeting of Commissioners.*—A pleading must state facts, not legal conclusions merely. The averment, that the plaintiffs did not have notice, does not exclude the idea that the appellant, one of the plaintiffs, was notified. If she had notice of the first meeting, she was bound to take notice of the adjournment. If the appellant had no notice of either meeting, she is not entitled to an injunction, because the act specially provides a remedy.

78	233
129	407
78	233
132	474
78	233
139	680
78	233
148	610
149	176
150	154
150	430
78	233
153	688
78	233
155	408

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SAME.—City Commissioners.—De Facto Officers.—Collateral Attack.—The requirements concerning the oath of the city commissioners is directory. If not sworn, they were *de facto* officers, and the validity of their acts can not to be questioned collaterally.

SAME.—Remedy at Law.—Where there is an adequate legal remedy, an injunction will not be granted.

From the Decatur Circuit Court.

W. A. Moore, C. Ewing and J. K. Ewing, for appellant.

B. F. Bennett, J. D. Miller and F. E. Gavin, for appellees.

WOODS, J.—The appellant and three others, who have refused to join in the appeal, sought an injunction against the appellees, forbidding them to proceed with the opening of a street, which, under the act of March 17th, 1875, 1 R. S. 1876, p. 318, the common council of the city had ordered to be opened, and which order, it is alleged, the appellee Forsythe, as street commissioner, was about to execute, to the irreparable injury of the plaintiffs.

It is charged in the complaint "that the proceedings to open the street are illegal and void in this, to wit:

"*First.* The oaths of the commissioners were not endorsed on their certificates of appointment, as required by law.

"*Second.* The commissioners did not take the oath of office required by law, as plaintiffs verily believe.

"*Third.* The plaintiffs had no notice whatever of the meeting of the commissioners on the 2d day of September, 1881, but on the contrary made an effort to obtain such information from the commissioners as would enable them to be present at such meeting, and could not obtain such information or notice, and the report and assessment were made in their absence, and without their knowledge; that none of the plaintiffs were present at the meeting of September 2d; nor had they any notice thereof, nor of the adjournment from the meeting of August 16th; that the commissioners were not legally qualified, nor authorized by law, to act as such. Wherefore," etc.

The following provisions of the act referred to are pertinent to, and indeed controlling of, the points to be decided:

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The 1st section provides for the appointment, by the circuit court, of five resident freeholders of such city as city commissioners, who, "before entering upon the duties of their appointment, shall take an oath to faithfully and impartially discharge their duties as commissioners, which oath shall be endorsed upon their certificate of appointment."

"A majority of such commissioners may act, determine and make valid and effectual reports." Sec. 3.

"If there be a defect of notice or failure of notice as to one or more interested persons, such failure or defect shall not affect such proceedings, except in so far as they may touch the interests or property of such person or persons themselves, and shall not avail any other person concerned in such proceedings. Upon the application of persons whose lands or property shall have been assessed, but who have not had notice, which they must affirmatively show, the city clerk shall notify such commissioners, who shall meet upon their own motion, hear and determine the claims of such persons, to whom five days' notice shall be given, and report to the council. In case they are entitled to damages which have not been assessed, the same shall be paid out of the city treasury, and in case the land shall have been assessed with benefits, and the commissioners deem the assessment just, the original assessment shall be deemed valid and effectual, and shall be enforced as originally made." Sec. 7.

Within twenty-eight days after a report of the commissioners has been made, it may be accepted, or "The common council may refer back the matters reported upon to said commissioners, with such suggestions as they may deem proper," "and may also call the attention of the commissioners to errors and defects, if any there be in such report." Sections 8 and 23.

An appeal may be had by "any person having an interest in the lands, affected by such proceedings. * * Upon such appeal may be tried the regularity of the proceedings of the commissioners, and the questions as to the amount of benefits or damages assessed, but such appeal shall not prevent such

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city from proceeding with the proposed appropriation, nor from making the proposed change or improvement. * * If the transcript shall show that a majority of such commissioners were present at the meeting in which were had the proceedings appealed from, then no question shall be considered or tried concerning the request of the common council to the commissioners, nor as to the character of the notice or manner of serving it upon said commissioners. * * No question shall be tried concerning the regularity of the appointment of the commissioners, their qualifications or competency; unless the appellant, by answer, duly verified, shall put such matter in issue," etc. Section 14.

"If the commissioners make a report to the common council, as herein provided, no injunction shall lie to restrain proceedings, unless the common council shall proceed to appropriate property upon which damages have been assessed, without first causing the same to be paid or tendered, but all other questions shall be raised and tried by appeal in cases where damages have been assessed, paid or tendered." Section 15.

The complaint shows, at least it is inferable therefrom, that damages were assessed in favor of the appellant, equal to the value of her land which was appropriated; and the payment or tender of the amount assessed is not denied. This being so, the letter of the section of the statute last quoted is, that "no injunction shall lie to restrain proceedings."

We might stop here; but, without this provision, it would be scarcely less clear that the ruling of the circuit court was right.

It is not denied that the persons who assumed to act as the city commissioners were the appointees of the circuit court, but it is alleged that their oaths were not endorsed on their certificates of appointment, according to law. This is not the averment of a fact but a legal conclusion. It is uncertain whether the pleader means to say that the oath was not endorsed on the certificate at all, or simply that, for some reason not given, the endorsement was not according to law.

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Endorsement, strictly speaking, means a writing upon the back of the instrument or paper, and the allegation of the complaint may mean that the oath, in this instance, was written below the certificate, or elsewhere on the face of the paper.

But it is further alleged, upon the belief of the plaintiffs, that the "commissioners did not take the oath of office required by law." This averment is subject to the same criticism. It does not certainly mean that they did not take an oath to discharge their duties, but may mean that their oath, for some reason, was not such as the law required; perhaps because it was written upon the face of the certificate, instead of the back; or because the officer who administered the oath failed to append his jurat, or to sign his name, or to attach his official seal. A pleading should state the facts and not conclusions of law merely. *Brokaw v. The Board, etc.*, 73 Ind. 543; *Kellogg v. Tout*, 65 Ind. 146; *Clark v. Lineberger*, 44 Ind. 223.

There were four of the commissioners, and the averment that *they* acted without being sworn would not exclude the presumption that three of them had taken the proper oath; and the report of three would have been valid.

But, conceding that a *quorum* of the commissioners had failed to qualify, still the express provision is that the fact can not be brought into question on appeal, and, if not on appeal, certainly not in a complaint for an injunction.

It was competent for the Legislature to have provided that the commissioners might act without being sworn, and, in the light of all the provisions quoted from the statutes, it is evident that the requirement of an oath is directory merely, and that its omission can not be made cause for collateral attack upon the proceedings.

Having received from the city clerk certificates of their appointment by the court, and having, in obedience to the order of the common council, entered upon the duties of their office, in reference to the proceedings in question, the commissioners were officers *de facto*, acting under color of authority. "The

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title of such an officer, or the validity of his acts as such, can not be indirectly called in question in a suit to which he is not a party; and this principle applies as well to judicial as ministerial officers." *Plymouth v. Painter*, 17 Conn. 585. *Steinback v. The State*, 38 Ind. 483; *Creighton v. Piper*, 14 Ind. 182; *Gumberts v. Adams Express Co.*, 28 Ind. 181; *Case v. The State*, 69 Ind. 46.

The allegation concerning notice is also defective. By the terms of the statute, no owner of property affected is permitted to take advantage of the failure to give notice to any other owner of such property. The plaintiffs were owners of separate properties, and had no joint or common interest. It may, therefore, be true, as alleged, that the plaintiffs did not have notice of the meeting of September 2d, and yet the appellant may have had notice. Moreover, it is not denied that the plaintiffs had due notice of the meeting on August 16th, and, having had notice of that meeting, they were bound to take notice of the adjournment, or, at least, it does not appear but that it was on account of their own fault, in failing to attend the first meeting, that they were ignorant of the adjournment to the second date.

Conceding, however, that the appellant was not duly notified of either meeting, she is not entitled to an injunction. The familiar rule applies, that an injunction can not be had, if the law furnishes an adequate remedy. The appellant had a plain and specific legal remedy under the provisions of section 7 of the statute, and, even without this section, it is not clear but that, under sections 8 and 23, she might have obtained a correction of any error or wrong committed against her.

The case of *The City of Logansport v. Pollard*, 50 Ind. 151, cited by counsel for the appellant, arose under a different statute, and is not applicable here.

Judgment affirmed, with costs.

Brown *et al.* v. The State, *ex rel.* Field.

No. 8360.

BROWN ET AL. v. THE STATE, EX REL. FIELD.

TOWNSHIP TRUSTEE.—*Bond.*—*School Revenues.*—*Mere Use not a Breach.*—

Conversion.—The mere use of school revenues of the township by a township trustee in his own business is not such a conversion of the money as constitutes a breach of the conditions of his bond.

SAME.—*Action on Bond.*—*Damages.*—*Judgment.*—In an action on the bond of a township trustee for a failure to account for and pay over school revenues received by him, the provision of section 7, 1 R. S. 1876, p. 781, that the judgment shall include an assessment of ten per cent. damages upon the amount thereof, is imperative.

From the Gibson Circuit Court.

C. A. Buskirk and W. M. Land, for appellants.*J. E. McCullough and L. C. Embree*, for appellee.

ELLIOTT, C. J.—James M. Alvis had been trustee of White River township, Gibson county, for several consecutive terms, and had, at the commencement of each term, executed a bond. The bond upon which this action is founded was executed by him as principal, and the appellants as sureties, at the time he entered upon his last term. Before the expiration of the term to which he was last elected, Alvis resigned, and the relator was appointed his successor. Demand was made upon Alvis for the money due from him as trustee, but no money was paid over or accounted for by him, and, upon a statement of account, he was found to be in default for a large sum. For this sum the court below gave judgment against Alvis and his sureties. The court included in the judgment, not only the amount unaccounted for, but also damages in the sum of \$483.31, being ten per centum on the amount of the school fund, for which Alvis had failed to account. From that judgment this appeal is prosecuted.

Two points are relied upon for a reversal. The first of these is, that Alvis had converted the money prior to the execution of the bond in suit, and that the sureties thereon are not liable. The assumption of fact upon which this position

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rests is unsupported. During all the terms held by Alvis, except the last, he fully paid all demands upon the township, made all requisite reports, and complied with all orders made by the proper authorities. A very short time before the approval of the bond upon which this action is based, the commissioners ordered all township trustees of the county to make reports showing the amount of township funds in their hands respectively, and to produce in open session of the board the money of the township. Alvis obeyed this order, and exhibited to the commissioners all the money due from him as trustee. It may well be doubted whether Alvis and his sureties are not now estopped to aver that the money was not that of the township. This question, however, we need not and do not decide. It plainly appears that, prior to the execution of the bond here sued on, Alvis had discharged his duty, for all demands were paid, and all orders obeyed. There was no breach of the condition of any bond executed prior to the one given at the commencement of his last term. Against the sureties on former bonds no liability accrued, because no condition had been broken.

The theory of the law adopted by counsel rests upon a foundation as slender and unsubstantial as that upon which the assumption of fact is placed. The theory is, that the use of the township money by the trustee in his own business was such a conversion as constituted a breach of the conditions of the bond. Mere use does not constitute such a conversion as gives a right of action upon the bond for condition broken. In *Shelton v. The State*, 53 Ind. 331, it was said, in speaking of a public officer, that "He is not, like a trustee or an agent, the mere bailee or custodian of the money in his hands. The money which he receives becomes his own money, and when he has accounted as required by law and by the terms of his bond, nothing further can be required of him." In *Linville v. Leininger*, 72 Ind. 491, the cases of *Morbeck v. The State*, 28 Ind. 86, and *Rock v. Stinger*, 36 Ind. 346, are approved, and the

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doctrine of the case from which we have quoted recognized and enforced.

The second point relied upon by appellants is, that the court erred in assessing ten per centum damages on the amount of the school fund received by Alvis, and for which he failed to account. The statute is directly against appellants. It is provided, that in case the trustee shall fail to discharge the duties required of him, "relative to schools and school revenues, the board of county commissioners shall cause suit to be instituted against him, on his official bond, and, in case of recovery against him, the court rendering the judgment, shall assess upon the amount thereof ten per cent. damages, to be included in said judgment." 1 R. S. 1876, p. 782, sec. 7. It was the duty of the trustee to pay over and account for all school revenues which were received by him; and, having failed to discharge this duty, the condition of his bond was broken, and he and his sureties became liable for the damages prescribed by the law in force when the bond was executed. *Goldsberry v. The State, ex rel.*, 69 Ind. 430.

Judgment affirmed.

NIBLACK, J., was absent when this case was considered.

No. 8579.

COX ET AL. v. ALBERT ET AL.

REPLEVIN.—Pleading.—Complaint and Affidavit.—A complaint, which contains all the statutory requisites of an affidavit to obtain an order for the delivery of personal property, and is verified by the oath of the plaintiff or of some one in his behalf, will be sufficient both as an affidavit and a complaint in replevin.

SAME.—Evidence.—Demand.—Conversion.—In a suit for the recovery of the possession of personal property, alleged to be unlawfully detained, if a

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wrongful conversion of the property by the defendant is shown by the evidence, a demand for the property, before suit brought, and proof of such demand, are alike unnecessary.

SAME.—*Pawn or Pledge.—Tender.*—Where personal property is pawned or pledged as a security for a debt or loan, and the pledgee, without notice to the pledgor, wrongfully disposes of the property or converts the same to his own use, the pledgor may sue at once for the recovery of the property, or of its value, without any demand therefor, and without having first paid or tendered the amount of such debt or loan.

SAME.—*Affidavit.—County in which Property is Detained.*—In an affidavit in replevin, the statute requires that the affiant should state in what county he believes the property is detained; but it is not necessary to the validity of the verdict, that this statement should be sustained by any evidence.

From the Orange Circuit Court.

J. Cox and W. W. Spencer, for appellants.

M. B. Williams, for appellees.

Howk, J.—This was a suit by the appellees against the appellants to recover the possession of certain articles of personal property, and damages for the detention thereof. The appellants answered by a general denial of the complaint. The cause was tried by a jury, and the following verdict, signed by their foreman, was returned into court: "We, the jury, find for the plaintiff, and that the defendant Nancy unlawfully detains from the plaintiff Annie Albert the following personal property, mentioned in the complaint, and that the said Annie Albert is entitled to the possession thereof, and that said property is of the value stated herein, to wit: One gold watch and chain, valued at forty-seven (\$47) dollars, and that plaintiff has been damaged the sum of one cent on account of the detention thereof; as to the residue of the property mentioned in complaint, we find for the defendant."

The appellants' motions for a new trial, and in arrest of judgment, having each been overruled, and their exceptions saved to each of these rulings, the court rendered judgment that the appellees recover of the appellants the said sum of \$47, and one cent damages, and that each party pay their own costs accruing by this suit.

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The appellants have here assigned, as errors, the following decisions of the circuit court :

1. In overruling their motion for a new trial ; and,
2. In overruling their motion in arrest of judgment.

The alleged error of the court, in overruling the motion in arrest of judgment, may properly be considered first ; for this motion called in question the sufficiency of the complaint. It seems to us, that the complaint was sufficient, and would have been good even on a demurrer thereto, for the want of facts. It contained all the allegations required in a complaint in replevin, and all the statutory requisites of an affidavit to obtain a writ for the delivery of the property ; and it was duly verified by the appellee Annie Albert. It was sufficient, both as a complaint and as an affidavit in replevin. *Dunn v. Crocker*, 22 Ind. 324 ; *Davis v. Warfield*, 38 Ind. 461. Certainly, there was no defect in the complaint, which could not be supplied by the evidence and cured by the verdict ; and, therefore, no error was committed by the court in overruling the motion in arrest of judgment. *Donellan v. Hardy*, 57 Ind. 393 ; *Galvin v. Woollen*, 66 Ind. 464 ; *Field v. Burton*, 71 Ind. 380.

In their motion for a new trial, the only causes assigned by the appellants therefor were, that the verdict of the jury was not sustained by sufficient evidence, and that it was contrary to law. We have carefully read the evidence, as it appears in the record, and it was sufficient, as it seems to us, to sustain the verdict of the jury on every material point. The complaint charged that the appellants, without right, had possession of, and unlawfully detained, the property in controversy from the appellees. In such a case, the appellants' counsel claim that a demand made for the property, before suit brought, was essential to the maintenance of the action, and that, without proof of such a demand, the defendants were entitled to a verdict. Conceding, without deciding, that this position is well taken, we are of the opinion, that, in this case, there is evidence in the record, which fairly tends to show, and from

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which the jury might have fairly inferred and found, that such a demand had been made before the commencement of the action. Besides, evidence was introduced on the trial which strongly tended to prove, and from which the jury might well have found, that the appellants had wrongfully converted the property in controversy to their own use. Where such a conversion is shown or found, a demand of the property, before suit brought, and proof of such demand, are alike unnecessary. *Nelson v. Corwin*, 59 Ind. 489; *Proctor v. Cole*, 66 Ind. 576; *Bunger v. Roddy*, 70 Ind. 26; *Hon v. Hon*, 70 Ind. 135.

There was evidence introduced tending to prove that the appellee Annie Albert had pawned or pledged the property in dispute to the appellant Nancy Cox, to secure a loan or debt of ten dollars. Upon this evidence, the point is made by the appellants' counsel, that before the appellee Annie could recover in this case, she must pay or tender the ten dollars loaned or paid to her by Mrs. Cox. But, as we have already said, there was also evidence tending to show, and the jury might have found, that the appellant Nancy had converted the property pledged to her own use, without having first demanded payment of the ten dollars, and without having given notice to the pledgor, Annie, of her intention to dispose of the property, if the debt or loan were not paid. In such a case, the law is settled, we think, that the pledgor may sue at once for the recovery of the property or of its value, without having first paid or tendered the amount of the debt or loan for which the property had been pawned or pledged. *Evans v. Darlington*, 5 Blackf. 320; *The Indiana, etc., Railway Co. v. McKernan*, 24 Ind. 62, on p. 67; *Wilson v. Little*, 2 N. Y. 443.

The appellants' counsel also insist that the evidence was insufficient to sustain the verdict, because it not only failed to show that the property was in Orange county, but it even tended to prove that the property was not in this State, at the time this action was commenced. There is nothing in this point, as it seems to us. True, it is provided in section 129

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of the civil code of 1852, that, in the affidavit to obtain a writ for the delivery of personal property, the affiant must state, among other things, in what county he believes the property to be detained; and the verified complaint, in this case, contains the statement that the property was detained in Orange county. But it was not necessary to the validity of the verdict that this statement should be sustained by any evidence. In section 133 of the code, it is provided that "if the sheriff can not find the property or any part thereof, the action shall not abate, but be prosecuted to final judgment." In section 374 of the code, it is further provided, that, in such cases, the judgment for the plaintiff shall be for the value of the property, in case a delivery can not be had, and damages for the detention thereof. In the case at bar, the evidence showed that, when the sheriff of Orange county, by virtue of the writ for the delivery of the property, issued herein and then in his hands, demanded said property from the appellant Nancy Cox, she refused to surrender the same, and that the said sheriff was unable to find the same, or any part thereof. This evidence was sufficient, on the point under consideration, to sustain the verdict and judgment below for the appellees, for the value of the property and damages for the detention thereof.

For the reasons given, we are of the opinion that the court did not err in overruling the appellants' motion for a new trial.

The judgment is affirmed, at the appellants' costs.

No. 8293.

CUPPY v. O'SHAUGHNESSY.

PLEADING.—*Departure.*—*Verdict.*—*Judgment.*—The complaint alleged ownership of a town lot and a building thereon, and that the defendant, without right, was about to remove the building, to the irreparable injury of the plaintiff. Wherefore, etc. Answer, that the defendant had leased the lot from the plaintiff, with the right to erect the building, and

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remove the same; that, while in possession and after written notice to quit, he was about to remove the building, as alleged in the complaint. Reply:

1. General denial. 2. That under a judgment against the plaintiff and defendant foreclosing a mechanic's lien upon the building and lot, for an indebtedness incurred by the defendant for materials for building, the same had been sold at sheriff's sale, and that in order to save his title to the lot the plaintiff had purchased the sheriff's certificate of sale and still holds it. *Held*, that the reply was a departure, and a demurrer to it should have been sustained.

Held, also, that a verdict, finding that "the plaintiff has a lien on the building and lot for \$119.40," did not warrant a judgment for either party, and should have been set aside.

PLEADING.—*Estoppel*.—The facts admitted by a demurrer to a pleading must be taken as true against, as well as in favor of, the pleader.

From the Benton Circuit Court.

M. H. Walker, I. H. Phares, J. M. Larue and F. B. Everett, for appellant.

D. Smith, I. H. Calais and G. Wadsworth, for appellee.

WOODS, J.—The appellant, who was the defendant below, has assigned error upon the overruling of his demurrer to the second paragraph of reply, and of his motions, respectively, for a *venire de novo*, and for a new trial.

The complaint is in one paragraph, and charges, in substance, that the plaintiff is the owner in fee simple of lots 213 and 215, in the town of Templeton, Benton county, Indiana, together with a frame building thereon situate and the appurtenances thereunto belonging; that the defendant, without legal or equitable right, is threatening to remove, and unless restrained will remove, said building from the premises, and that the plaintiff will sustain irreparable injury and great damage if the defendant should carry out his threats. Wherefore, etc.

Besides the general denial, the answer contains a paragraph to the effect following, namely:

That on the first day of March, 1877, the plaintiff made a written lease of the lots mentioned in the complaint to the defendant for the period of one year, by the terms of which lease the defendant had the privilege of erecting on the lots a one-story frame building and all fences necessary for his busi-

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ness, with the right at any time to remove the house and improvements, at the defendant's option ; that he did accordingly erect on the lots the house in question, and after the expiration of the lease, to wit, on the — day of —, 1878, and while in possession of the premises, upon written notice received from the plaintiff to vacate the premises and remove the house and other improvements, he accordingly entered upon the premises to remove the house, and thereupon the plaintiff commenced this action. Wherefore, etc. A copy of the lease, corresponding in terms to the allegations of the plea, in respect to the privilege of erecting and removing the building, is made an exhibit.

The reply consists of a general denial, and a second paragraph substantially as follows :

Admitting the lease of the premises as averred, and the erection of the building by the defendant, the plaintiff alleges that the defendant purchased the lumber and other materials used in its construction expressly for such use, of the firm of Smith & Haver, and on the 2d day of May, 1877, became indebted to said firm, for the lumber and materials so furnished and used, in the sum of \$133 ; that, within sixty days after the completion of the building, Smith & Haver filed in the office of the recorder of the county a notice that they intended to hold a mechanic's lien for said sum upon the building and lots, which notice was duly recorded ; that at the September term, 1877, of the Benton Circuit Court, and within one year after the recording of the notice, Smith & Haver commenced an action against the plaintiff and one Frank Woods, to foreclose their lien on said lots and building, and to recover judgment for the sum due them ; that on the 4th day of September, 1877, a judgment (by default) was rendered against the plaintiff for said sum, and a decree for the sale of the property for the satisfaction of the lien, upon which decree and judgment an execution was duly issued to the sheriff of the county, whereby, after due notice, the sheriff did, on the 15th day of December, 1877, sell the property to Smith & Haver, in sat-

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isfaction of their demand and costs, and gave them a certificate of such sale, which certificate the plaintiff afterward purchased, for the purpose of saving his lots, and still owns the same, having paid therefor the full amount of principal, interest and costs. Wherefore he prays that the defendant be enjoined perpetually from removing the said building, or that, before he be allowed to remove it, he be compelled to repay to the plaintiff the amounts by him expended by reason of said foreclosure and in the purchase of said certificate.

In accordance with the peremptory direction of the court, the jury returned a verdict, which, omitting the title of the cause and signature of the foreman, is as follows:

"We, the jury, find for the plaintiff, that he has a lien upon the frame building on lots 213 and 215, in the town of Templeton, in Benton county, Indiana, for \$119.40."

This verdict and the judgment rendered upon it are a clear departure from the complaint. Had the defendant failed to answer, or permitted judgment to go by default, it is manifest that no such relief could have been granted. None such is prayed for, and no right is asserted to which it is pertinent. Any process of pleading which leads to the granting of relief to the plaintiff which could not be adjudged upon the complaint itself, is necessarily a departure. The verdict before us finds nothing in favor of the plaintiff except the alleged lien. This being outside of the issue tendered by the complaint, it follows that the motion for a *venire de novo* should have been granted.

As against the answer in general denial, the plaintiff was bound to prove not only his alleged ownership of the building, but also of the lots on which it stood, or, at least, to show a right to have the building remain on the lots; for it is evident, that if the plaintiff owned the building, but had no right to have it stand where it was, he could not be entitled to an injunction against its removal by the defendant, unless, possibly, by showing that the defendant was acting as a mere trespasser and without authority from the owner of the lots. But, while silent in respect to these essential facts, the ver-

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dict, by finding that the plaintiff has a lien upon the building, raises the necessary implication that he was not the owner of the building. It is not, however, such a special verdict as to warrant a judgment upon it in favor of the defendant, and should, therefore, have been set aside.

It follows from what has been said that the demurrer to the second paragraph of the reply should have been sustained. It is proper, however, that we state our views of that pleading directly and more distinctly.

The paragraph admits the truth of the answer to which it is addressed, alleges that the materials were purchased and the building erected by the defendant, and thus undertakes to avoid the defendant's consequent right to remove the building, by setting up the proceedings whereby a mechanic's lien was foreclosed and the property sold to Smith & Haver, who had transferred their certificate of purchase at the sheriff's sale to the plaintiff. If, upon the facts stated in the reply, the defendant's title to the building was divested and transferred to the plaintiff, the reply is good, because it supports the title alleged in the complaint; but if the plaintiff, by purchasing the certificate, acquired only a lien upon the property, the legal title remaining in the defendant, then, like the verdict, the reply is a departure from the complaint.

As a mere lien-holder the plaintiff might be entitled to an injunction against the removal and destruction of the property, and consequent impairment of his security. But, in order to obtain such relief, he must declare upon his right as a lien-holder, and not as the owner.

It is clear upon the facts stated in the reply, that the foreclosure of the alleged lien and the sale made by the sheriff did not affect the title of the defendant to the house, for the one sufficient reason that the defendant was not made a party to the suit. The counsel for the appellee have confused the discussion on this point, by going outside of the pleading to refer to the evidence.

It is a question of pleading alone, and, it being admitted in

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the reply that the defendant built the house and incurred the debt for the materials, a reference to the evidence, for the purpose of showing that another did these things, and that therefore the defendant was not a necessary party to the foreclosure, is not permissible. A demurrer admits the truth of the facts set up in the pleading demurred to, and, for the purpose of determining the correctness of the ruling upon the demurrer, the facts so admitted must be taken as true against, as well as in favor of, the pleader. The estoppel is mutual.

If, therefore, the plaintiff acquired any right against the defendant, by his purchase of the sheriff's certificate of sale, as stated in the reply, it was the right to be subrogated to the original claim of Smith & Haver, subject to all defences of the appellant, as if never foreclosed. Holding such a lien, the plaintiff could foreclose it, if valid, by a direct suit for that purpose, but not in the manner which was permitted in this case.

The facts alleged in the reply, however, do not show that Smith & Haver acquired a valid lien against the defendant's house. In the recent case of *Hamilton v. Naylor*, 72 Ind. 171, which has been approved and followed in later cases (the writer of this opinion dissenting), it is held that one who furnishes material for a part only of a building must file his notice of intention to hold a lien within sixty days from the furnishing of the material, and must bring his action within one year from the same time, unless a credit be given. The allegations of the pleading under consideration do not conform to this rule; and, as the defendant was not made a party to the alleged foreclosure, he is not estopped by the decree, and may dispute the validity of the lien.

It is not material that the other questions discussed by counsel should be considered.

The judgment is reversed, with costs, and with instructions to sustain the demurrer to the second paragraph of reply.

The State v. Cummins.

No. 9732.

THE STATE v. CUMMINS.

CRIMINAL LAW.—Vagrancy.—Affidavit.—An affidavit charged that, on, etc., at, etc., “J. C., an able-bodied male person, who has arrived at years of discretion, was then and there unlawfully found without any visible means of support, and then and there unlawfully found loitering and idling in and about the saloon of F. and the saloon of W., which said saloons were then and there tippling-houses, * * without being there engaged in some useful employment,” is a sufficient charge of vagrancy in a prosecution before a justice of the peace, under the act of 1877, Acts 1877, Spec. Sess., p. 80.

SAME.—Duplicity.—Duplicity is no ground for quashing an affidavit.

From the Jackson Circuit Court.

D. P. Baldwin, Attorney General, *W. W. Thornton, F. L. Prow*, Prosecuting Attorney, and *D. A. Kochenour*, for the State.

NIBLACK, J.—This was a criminal prosecution against John Cummins, for vagrancy, and was commenced before a justice of the peace. There was a trial and conviction before the justice, and upon an appeal to the circuit court, the affidavit was quashed and the defendant discharged. The State has appealed and assigned error upon the decision of the court quashing the affidavit.

The charging portion of the affidavit was as follows:

“John Stout upon his oath swears, that, on the 25th day of July, 1881, and from that day continuously until the 8th day of August, 1881, at and within the county of Jackson, and State of Indiana, John Cummins, an able-bodied male person, who has arrived at years of discretion, was then and there unlawfully found without any visible means of support, and then and there unlawfully found loitering and idling in and about the saloon of Frank Faulk, and the saloon of John Winscott, which said saloons were then and there tippling-houses and beer-houses, and the said John Cummins as aforesaid was then and there unlawfully found without any visible employment, lodging and idling in and around the sheds, stables and hacks

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wrongful conversion of the property by the defendant is shown by the evidence, a demand for the property, before suit brought, and proof of such demand, are alike unnecessary.

SAME.—Pawn or Pledge.—Tender.—Where personal property is pawned or pledged as a security for a debt or loan, and the pledgee, without notice to the pledgor, wrongfully disposes of the property or converts the same to his own use, the pledgor may sue at once for the recovery of the property, or of its value, without any demand therefor, and without having first paid or tendered the amount of such debt or loan.

SAME.—Affidavit.—County in which Property is Detained.—In an affidavit in replevin, the statute requires that the affiant should state in what county he believes the property is detained; but it is not necessary to the validity of the verdict, that this statement should be sustained by any evidence.

From the Orange Circuit Court.

J. Cox and *W. W. Spencer*, for appellants.

M. B. Williams, for appellees.

Howk, J.—This was a suit by the appellees against the appellants to recover the possession of certain articles of personal property, and damages for the detention thereof. The appellants answered by a general denial of the complaint. The cause was tried by a jury, and the following verdict, signed by their foreman, was returned into court: "We, the jury, find for the plaintiff, and that the defendant Nancy unlawfully detains from the plaintiff Annie Albert the following personal property, mentioned in the complaint, and that the said Annie Albert is entitled to the possession thereof, and that said property is of the value stated herein, to wit: One gold watch and chain, valued at forty-seven (\$47) dollars, and that plaintiff has been damaged the sum of one cent on account of the detention thereof; as to the residue of the property mentioned in complaint, we find for the defendant."

The appellants' motions for a new trial, and in arrest of judgment, having each been overruled, and their exceptions saved to each of these rulings, the court rendered judgment that the appellees recover of the appellants the said sum of \$47, and one cent damages, and that each party pay their own costs accruing by this suit.

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The appellants have here assigned, as errors, the following decisions of the circuit court:

1. In overruling their motion for a new trial; and,
2. In overruling their motion in arrest of judgment.

The alleged error of the court, in overruling the motion in arrest of judgment, may properly be considered first; for this motion called in question the sufficiency of the complaint. It seems to us, that the complaint was sufficient, and would have been good even on a demurrer thereto, for the want of facts. It contained all the allegations required in a complaint in replevin, and all the statutory requisites of an affidavit to obtain a writ for the delivery of the property; and it was duly verified by the appellee Annie Albert. It was sufficient, both as a complaint and as an affidavit in replevin. *Dunn v. Crocker*, 22 Ind. 324; *Davis v. Warfield*, 38 Ind. 461. Certainly, there was no defect in the complaint, which could not be supplied by the evidence and cured by the verdict; and, therefore, no error was committed by the court in overruling the motion in arrest of judgment. *Donellan v. Hardy*, 57 Ind. 393; *Galvin v. Woollen*, 66 Ind. 464; *Field v. Burton*, 71 Ind. 380.

In their motion for a new trial, the only causes assigned by the appellants therefor were, that the verdict of the jury was not sustained by sufficient evidence, and that it was contrary to law. We have carefully read the evidence, as it appears in the record, and it was sufficient, as it seems to us, to sustain the verdict of the jury on every material point. The complaint charged that the appellants, without right, had possession of, and unlawfully detained, the property in controversy from the appellees. In such a case, the appellants' counsel claim that a demand made for the property, before suit brought, was essential to the maintenance of the action, and that, without proof of such a demand, the defendants were entitled to a verdict. Conceding, without deciding, that this position is well taken, we are of the opinion, that, in this case, there is evidence in the record, which fairly tends to show, and from

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ELLIOTT, C. J.—The complaint of the appellant alleges that the appellee Edwards executed to one Isabella Klopp three promissory notes, and to secure their payment executed to her a mortgage on real estate; that the said Isabella afterward assigned the notes and mortgage to the appellant, and that subsequent to the execution of the mortgage the appellee Flanagan purchased the real estate therein described. The answer of Flanagan is, in substance, as follows: That he purchased the mortgaged premises of Edwards, and as part of the consideration agreed to pay the notes and mortgage described in the complaint; that he was willing to pay so much of the mortgage as is due, and was willing and ready to do so on the day it became due; that before the notes became due, and before the appellee had any notice of the assignment, one Mary E. Klopp commenced proceedings in attachment against the plaintiff's assignor, before a justice of the peace; that, at the time the affidavit in attachment was filed, the attachment plaintiff also filed an affidavit against the appellee as garnishee; that process was duly served upon them; that the appellant's assignor appeared to said action, as did also the appellee; that issues were formed, trial had and judgment rendered in favor of the attaching creditor; that the appellee paid into court the money due upon the note in suit.

The second paragraph of appellant's reply alleges that before judgment in the attachment proceeding he purchased the note, paid full consideration thereof, and received it without notice of such proceedings. This paragraph of the reply is clearly bad. The maker of the note had a right to pay it to the party entitled thereto, and had also the right to pay the money into court after the service of the process upon him. *Sharts v. Awalt*, 73 Ind. 304. Of course, if there had been any notice of the assignment before such payment, it would have been otherwise. The appellant, having purchased after the commencement of the attachment proceedings, was a purchaser *pendente lite*, and can not recover from the garnishee who had paid the money before notice that there had been an as-

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signment of the note. If the assignment had been made prior to the commencement of such proceedings, and notice thereof had been given to the maker of the note, then a different question would be presented.

The third paragraph of the reply is substantially the same as the second, and for the reasons given is clearly bad.

The fourth paragraph of the reply is bad for the reason that it does not aver that Flanagan had notice of the assignment before he paid the money into court in the garnishee proceedings. It avers that he had notice, but does not aver that it was prior to the payment of the money.

The fifth paragraph of the reply alleges that the attachment proceedings set forth in the answer were instituted by the appellee Flanagan, for the fraudulent purpose of depriving appellant of his debt; that Flanagan first attempted to purchase the notes and mortgage of the payee; that, failing to do so, he caused the attachment proceedings to be instituted and himself garnisheed; that he caused this to be done after he had reasonable cause to believe that appellant had purchased said notes and mortgage; that appellant purchased the said notes in good faith, for a valuable consideration, and before notice of the attachment proceedings; that Flanagan had notice of appellant's purchase in time to have availed himself of the same as a defence to the garnishee proceedings, but, pursuant to a fraudulent design to deprive appellant of his debt, neglected and failed to avail himself of such defence.

This reply is badly drawn, but is, we think, sufficient upon demurrer. It shows notice to the appellee, it shows a fraudulent design to defeat appellant, and shows also that, pursuant to this design, the appellee himself caused the attachment proceedings to be instituted. A maker of a note, who has notice of the assignment, can not defeat an assignee by fraudulently procuring garnishee process to be served upon himself, and then paying the money due upon the note to the plaintiff in the attachment proceedings. After notice of the assignment, the maker of the note could not rightfully pay the note to any

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one except the assignee. *King v. Vance*, 46 Ind. 246; *Covert v. Nelson*, 8 Blackf. 265.

This paragraph is good, for the reason that it shows notice to the maker before the judgment in the garnishee proceedings. For this reason the sixth paragraph of the reply is sufficient. Although both these paragraphs were good, we can not reverse the judgment. The seventh paragraph, to which a demurrer was overruled, sets forth substantially the same facts. It is, at least, of such a character as to admit all the material evidence that could have been introduced under the fifth and sixth paragraphs. The error in sustaining the demurrer was a harmless one.

Appellees insist that an exception was not properly reserved. We think otherwise. The record recites that the court "sustains the demurrer to the 2d, 3d, 4th and 5th paragraphs of the reply, to which ruling the plaintiff excepts, and plaintiff has leave to amend his reply by Tuesday." At a subsequent day this entry appears: "And the plaintiff declines to further amend his reply, and abides the ruling of the court on the demurrer." The exception was not withdrawn. No amendment was made, and the exception previously entered remained in full force. Nothing was done to impair its efficacy. No act was done by appellant which can be construed into an abandonment of his exception. *Washburn v. Roberts*, 72 Ind. 213. The case of *Kolle v. Foltz*, 74 Ind. 54, cited by the appellees, has no application, for the exception was not entered until a subsequent term.

Appellant complains that the appellee Flanagan was permitted to amend his answer after the issues had been closed, and after one trial had been had. The allowance of amendments is a matter very much within the discretion of the trial court, and unless there has been an abuse of this discretion, the appellate court will not interfere. We can not say that the court abused its discretion in this instance.

The court granted appellees a new trial, and the appellant bitterly attacks the ruling. The granting of new trials, like

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the allowance of amendments, is a matter largely within the discretion of the trial court. It is very seldom, indeed, that judgments are reversed because a new trial was granted by the trial court. A very clear and strong case must be made out to justify interference. This is not such a case.

Judgment affirmed.

 No. 8299.

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78	257
159	691

INSTRUCTION.—Disregard of Issue.—Where an instruction of the court is confined to an affirmative defence, in disregard of the general denial pleaded, the error will be deemed harmless, there being no conflict in the evidence, or dispute in the case, except in reference to the affirmative issue.

SAME.—Jury.—Presumption.—It is not to be presumed, on appeal, that the jury misunderstood the meaning of an instruction.

PRACTICE.—Exclusion of Question to Witness.—It is not error to exclude a question, if no statement is made of what facts are expected to be elicited; and, if the bearing of the proposed testimony is remote and inferential, its relevancy should also be suggested.

From the Monroe Circuit Court.

J. W. Buskirk, H. C. Duncan, J. H. Loudon and R. W. Miers, for appellants.

G. W. Friedley and H. Friedley, for appellee.

WOODS, J.—The appellee sued the appellants for the reasonable value of work and labor done for them at their request, "in preparing and dressing seventy-seven thousand white oak staves."

The answer of the appellants consisted of a general denial, and a special plea that the plaintiff did the work under a special agreement to accept in full compensation therefor the

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shavings and blocks cut from the staves, commonly known as "offals," and that the plaintiff received said offals.

The errors insisted upon consist in the giving of instructions, and the exclusion of certain testimony.

In its second instruction the court said: "The plaintiff has addressed his proof to the allegations of his complaint. The defendants set up a special contract whereby they say the plaintiff was to shave and prepare the staves for the offal."

The objection made to this charge is that the statement that the plaintiff had addressed his proof to his complaint was likely to be misunderstood and taken by the jury as meaning that the plaintiff had proved his complaint. We can not indulge the presumption of such a misunderstanding.

The further objection is made that the instruction limited the defence to but one question. There may have been technical error in this, because of the general denial, but if so the error was harmless. There is no conflict in the evidence about the fact of the plaintiff's employment by the defendants to do the work, and of the amount of work done. The real question for the jury was therefore what the instruction declared it to be. *Comstock v. Whitworth*, 75 Ind. 129. So far as concerned the set-off or counter-claim made by the appellants for the value of the offals used by the plaintiff, the matter was distinctly and clearly left to the jury in other instructions, of which no complaint is made.

The appellants asked certain witnesses to state the cost of the fuel necessary to run the mill of the appellee per day. Upon objection made, the court did not permit the witnesses to answer. It is now insisted that while the cost of such fuel was not itself in issue, the proof of it would have had an important bearing in determining the disputed question, whether the work was agreed to be done for the offal. Without deciding whether possible answers to the question might have tended to support the position of the appellants, and were admissible for that purpose, it is enough to say that no statement was made to the court explaining what answers

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were expected, nor what bearing it was claimed the answers might have in the case. The subject of the inquiry being in itself plainly outside of the issues to be tried, and relevant, if at all, only by way of remote and inferential argument, counsel should have stated what they expected to prove, and should also have explained wherein the evidence would be relevant; and, having failed to do so, they will not be heard to complain of the ruling, on appeal.

The judgment is affirmed, with costs.

No. 9610.

PARKER v. THE STATE.

PRESUMPTIONS.—*Trial Court.*—*Supreme Court.*—*Evidence.*—*Practice.*—In the Supreme Court, all the presumptions go in favor of the proceedings below, and a judgment will not be reversed for the exclusion of evidence unless it be shown that the evidence excluded had some relation to the real and particular question involved at the trial.

CRIMINAL LAW.—*Injuring Toll-Gate.*—*Turnpike.*—*Highway.*—*Presumption.*—*Instructions.*—In the absence of the evidence given upon the trial of a person indicted for unlawfully injuring a toll-gate, 2 R. S. 1876, p. 479, sec. 66, instructions correctly defining the rights of the travelling public over turnpikes constructed upon existing highways will be presumed applicable to the evidence.

From the Fayette Circuit Court.

C. Roehl and *R. Conner*, for appellant.

D. P. Baldwin, Attorney General, *W. W. Thornton*, *M. D. Tackett*, *L. W. Florea* and *G. C. Florea*, for the State.

NIBLACK, J.—This was a prosecution against David Parker, upon an indictment for unlawfully injuring a toll-gate, the property of the Waterloo Township Turnpike Company, under section 66 of the misdemeanor act, 2 R. S. 1876, p. 479.

A motion to quash the indictment was overruled. Trial by

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a jury. Verdict finding the defendant guilty as charged. Motion for a new trial overruled, and judgment on the verdict.

Error is assigned upon the overruling of the motion to quash the indictment, and upon the denial of the motion for a new trial.

No question is presented here upon the alleged insufficiency of the indictment, as counsel for the appellant have failed to indicate any specific objection to the indictment.

At the trial, the appellant offered to prove, by his own testimony, that he had paid his toll over the turnpike company's road in advance, by labor upon the road, and that he broke down the toll-gate, constituting the injury complained of, because the gate-keeper would not permit him to pass without the further payment of toll. This proposed evidence was excluded by the court. Its exclusion was assigned as a cause for a new trial, and is urged here as a reason for a reversal of the judgment.

But the evidence admitted upon the trial is not in the record. We have, therefore, nothing before us indicating the theory upon which the action was prosecuted, or showing the facts upon which the State relied for a conviction.

Without deciding that the proposed evidence was in any event inadmissible, we are without the means of ascertaining whether it had any relevancy to the evidence introduced, or the case made by the State.

All the presumptions go in favor of the proceedings below, and a judgment will not be reversed for the exclusion of evidence, unless it be shown that the evidence excluded had some relation to the real and particular question involved at the trial. *Curry v. Bratney*, 29 Ind. 195.

Objection is also made to two of the instructions given to the jury. These instructions, each in a different form, purported to define the rights of the travelling public over turnpike roads constructed along and upon previously existing highways, and so far as we have observed gave the law correctly as applicable to that class of turnpike roads.

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It is insisted that these instructions ought to have been so framed as to apply to every class of turnpike roads, and that, because they were not so framed, they were erroneous. The evidence, however, not being in the record, we must presume that the instructions were applicable to the evidence, and that the turnpike road, to which the evidence referred, was shown to have been constructed over and upon a previously existing highway.

The record discloses nothing requiring us to reverse the judgment below.

The judgment is affirmed, with costs.

No. 8713.

EICHELS ET AL. v. THE EVANSVILLE STREET RAILWAY COMPANY ET AL.

STREET RAILWAY.—City.—Legislative Grant.—A grant of authority to lay and maintain street railway tracks upon the public streets of cities may be conferred by the Legislature, either in express words or by necessary implication.

SAME.—Municipal Corporation.—Power.—The ordinary and incidental powers of a municipal corporation are not broad enough to include the power to grant to a street railway company the right to lay tracks and conduct the business of transporting passengers upon and over the streets of the municipality.

CITY CHARTERS.—Power of Legislature to Amend.—The Legislature may, by general legislation, alter or amend the special charters of municipal corporations.

SAME.—Intention.—Where the intention of the Legislature is to apply the act to cities organized under special charters as well as those incorporated under general laws, that intention will govern, and the act will be deemed the law, not only of one class, but of all.

SAME.—Statute Construed.—The act of June 4th, 1861, 1 R. S. 1876, p. 754, granting the right to street railway companies to locate and maintain tracks upon the streets of cities, applies to cities organized under a special charter.

78	261
139	301
78	261
150	130

78	261
162	57
162	168

78	261
106	277
163	281

78	261
169	579
169	580
169	586

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STREET RAILWAY.—Damage to Property Owners.—A horse street railway may be placed and operated upon the streets of a municipal corporation without increasing the burden of the servitude, and the owner of the fee is not entitled to compensation because of such use of the streets upon which his property abuts.

From the Vanderburgh Circuit Court.

C. Denby, A. Iglehart, W. F. Smith, D. B. Kumler and C. A. DeBruler, for appellants.

A. Gilchrist, V. Bisch and C. H. Butterfield, for appellees.

ELLIOTT, C. J.—The questions which this record presents are thus stated by the appellants' counsel:

"1. Can a municipal corporation, by ordinance, authorize street railway companies to incumber its streets by laying and maintaining railroad tracks therein without express authority therefor by the Legislature?

"2. Has the corporation appellee obtained the necessary legislative sanction to authorize the laying down and maintenance of its track in the streets of the city of Evansville?

"3. Can a street railway company, even with the proper legislative sanction, lay down and maintain its track in Second street, in the city of Evansville, without assessing and tendering damages to the abutting owners whose lots extend to the center of the street and upon which said track is laid?"

In an able argument, signally forcible and clear, counsel for the appellants maintain that these questions require a negative answer.

We concur, in the main, with the appellants upon the answer to the first question. In asserting that the grant of authority to lay tracks upon the public streets of a city must be expressly conferred, the counsel limit the rule more rigidly than the authorities warrant. Such an authority must, it is true, be conferred by statute, but it is not indispensably essential that the grant should be stated in express words. If it is conferred by necessary implication, it will be upheld and enforced. But the grant must be conferred either by express words or be necessarily implied. Without such a grant the

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public streets can not be used by a railway corporation for the transportation of passengers for hire. The right to so use the streets is a franchise, and such a franchise as can only exist by force of a legislative grant. The power to grant franchises is a high legislative trust, and it is a grave question whether the Legislature can delegate it to municipal corporations. *People's Railroad v. Memphis Railroad*, 10 Wal. 38. We are not, however, called upon to decide whether the Legislature can delegate this power, but we are required to decide whether such a power is embraced within the ordinary and incidental powers usually conferred upon, or possessed by, municipal corporations.

The city of Evansville was organized, and is acting under, a special charter granted prior to the adoption of the constitution of 1852, and possesses the ordinary rights and powers of a municipal corporation. There is no provision in the original charter, nor in any of the various acts directly amending it, conferring power to grant to either steam or horse railway companies the right to use the streets of the city. The ordinary and incidental powers of a municipal corporation are not broad enough to include the power to grant to a railway company the right to lay tracks and conduct the business of transporting passengers upon and over the streets of the municipality. Such a power is an extraordinary one, and one which can not be implied from a charter of a municipal corporation which confers only the usual powers ordinarily bestowed upon such corporations. We are speaking now, not of the intersection and crossing of streets by railway tracks, laid down in building lines of road which run through the city, but of railways exclusively doing business in the city and occupying the streets for that purpose.

The charter of a municipal corporation may be amended or repealed at the pleasure of the Legislature. *Sloan v. The State*, 8 Blackf. 361; *The City of Indianapolis v. The Indianapolis Home, etc.*, 50 Ind. 215; *Lucas v. The Board, etc.*, 44 Ind. 524; 1 Dill. Munic. Corp., section 64. The power of the Legisla-

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ture to alter or amend the charter of Evansville can not be, and, as we understand counsel, is not doubted. The question presented is, not whether the Legislature can alter or amend, but whether it has done so.

On the 4th day of June, 1861, an act was passed by the General Assembly entitled "An act to provide for the incorporation of street railroad companies," containing, among others, these provisions:

"Sec. 1. *Be it enacted by the General Assembly of the State of Indiana*, That any number of persons, not less than five, being subscribers to the stock of any contemplated street or horse railroad company, may be formed into a corporation for the purpose of constructing, owning, and maintaining street or horse railroads, switches or side tracks, upon or through the streets of the cities or towns within the State, by complying with the following requirements: * * *

"Sec. 5. Such company may construct their track, switches, side tracks or turn-outs upon the streets of said cities or towns under the following conditions and restrictions:" * *

The contention of the appellants is, that this is a general law and can not apply to a city organized under a special charter, for the reason that such a charter can not be changed or altered except by a law directly amending or repealing the special charter. The question, then, which confronts us is this: Can the special charter of a municipal corporation be altered or amended by a general law?

Appellants refer us to the case of *Longworth's Ex'rs v. The Common Council of the City of Evansville*, 32 Ind. 322. Conceding that the doctrine of that case is sound, it can not affect the question here in hand. That case decides that a special charter may be amended by a special law. But that is not the question under discussion. We are not considering whether special legislation is valid in such cases, but whether an act, general in its terms, and with language broad enough to apply to all the cities of the State, howsoever incorporated, applies to and governs cities organized under special charters. Ref-

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erence is also made to *The State v. Branin*, 3 Zab. 484. This case does decide that special charters to municipal corporations can not be destroyed by subsequent general enactments. We are unable to ascertain the ground upon which the court rested its decision, for there is neither argument nor authority adduced in support of the ruling. The proposition is, in our opinion, too broadly stated. If the Legislature can alter or amend at will, it must rest with it to determine the manner in which the amendment shall be made. If it has the power to enact both general and special laws, it is the exclusive judge of which is the proper method. It is for the courts to determine, not which is the proper method in cases where either may be adopted, but what is the purpose and effect of the statute adopted. We think the true rule is that stated by Judge DILLON, who says: "It is a principle of very extensive operation that statutes of a general nature do not repeal, by implication, charters and special acts passed for the benefit of particular municipalities; but they are so when this appears to have been the purpose of the Legislature. If both the general and the special acts can stand, they will be construed accordingly. If one must give way it will depend upon the supposed intention of the law-maker, to be collected from the entire legislation, whether the charter is superseded by the general statute, or whether the special charter provisions apply to the municipality, in exclusion of the general enactment." 1 Dill. Munic. Corp., section 87. It is upon this general doctrine, that the case of *The City of Evansville v. Bayard*, 39 Ind. 450, proceeds. It was held in that case, that the act of 1867, relative to the assessment of shares of bank stock, superseded the provision upon that subject in the special charter of the city of Evansville. We are clear that the Legislature may, by general legislation, alter or amend the special charters of municipal corporations.

There is much more reason to doubt the power of the Legislature to amend special charters by special amendatory acts, than there is for doubting its power to change or repeal

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them by general legislation. Our constitution favors general legislation, and certainly, as to the creation of new corporations, forbids all special laws save only in the cases expressly named as exceptions. There are many very well considered cases holding that, under such a constitution as ours, special charters can not be amended; but this question is not presented, and we do not decide it. We do decide, however, that the special charter of a municipal corporation may be amended by general legislation. Where the intention is to apply the act to cities organized under special charters, as well as those incorporated under general laws, that intention will govern, and the act will be deemed the law, not only of one class of cities, but of all.

The language of the act of 1861 embraces all of the cities of the State. If there were any ambiguity in the language of the act, we should be bound to give it this effect, for it is very evident that the intention was that all of the cities of the State might, if the governing officers should so desire, receive the benefit of the law. In no other way than by a general law could any city, no matter how incorporated, obtain street railways, for it is very certain that under our constitution such corporations as street railways can only be created by general legislation.

We come now to the third and last question. It is the settled law of this State, that the public takes only an easement in the streets of a city, and that, if a steam railroad company lays its tracks upon the street, the owner of the fee is entitled to damages. *The Terre Haute, etc., R. R. Co. v. Scott*, 74 Ind. 29. It is contended that this principle applies to horse railroads. The very decided weight of authority is against appellants on this point. The question has received very full and very able consideration from courts and text-writers, and the difference between steam and horse railroads has been very clearly established. Appellants have cited only one case which sustains their contention, and in our search we have been able to find no other. The decision in *Craig v. Rochester City*,

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etc., *R. R. Co.*, 39 N. Y. 404, was that of a divided court, three of its members dissenting from the prevailing opinion. The decisions of the same court in other cases contain doctrines which it is impossible to reconcile with that which prevailed in the case relied upon by the appellants. This is especially true of *Davis v. The Mayor, etc.*, 14 N. Y. 506, 530, and *The People v. Kerr*, 27 N. Y. 188. The doctrine of the principal case under mention has not found favor outside of New York. The text-writers declare a different doctrine. Judge DILLON says: "The author regards the appropriation of a street for a horse railway, constructed and used in the ordinary mode, to be such a use as falls within the purpose for which the streets are dedicated or acquired under the power of eminent domain. When authorized or regulated by the public authorities, this is a public use within the fair scope of the intention of the proprietor when he dedicates the street or is paid for property to be used as a street. Such proprietor must be taken to contemplate all improved and more convenient modes of use. There is solid ground to distinguish between horse railways in streets, as ordinarily laid and used, which do not exclude the public, and common railways, which are generally so constructed as altogether to exclude a portion of the street from public use in the accustomed modes." 2 Dill. Munic. Corp., 3d ed., sec. 722. Judge COOLEY recognizes the distinction between horse railroads and ordinary steam railroads, and expresses the opinion that the laying down of a steam railroad track does add a new burden, entitling the owner of the fee to compensation, but that laying and operating a horse railroad does not. We quote his language:

"Perhaps the true distinction in these cases is not to be found in the motive-power of the railway, or in the question whether the fee-simple or a mere easement was taken in the original appropriation, but depends upon the question whether the railway constitutes a thoroughfare, or, on the other hand, is a mere local convenience. When land is taken or dedicated

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for a town street, it is unquestionably appropriated for all the ordinary purposes of a town street; not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants. Among these purposes is the use for carriages which run upon a grooved track; and the preparation of important streets in large cities for their use is not only a frequent necessity, which must be supposed to have been contemplated, but it is almost as much a matter of course as the grading and paving. The appropriation of a country highway for the purposes of a railway, on the other hand, is neither usual nor often important; and it can not with any justice be regarded as within the contemplation of the parties when the highway is first established. And if this is so, it is clear that the owner can not be considered as compensated for the new use at the time of the original appropriation." Cooley Const. Lim. 556.

The doctrine of the eminent jurists, from whose works we have quoted, is fully sustained by the adjudged cases. *Elliott v. Fair Haven, etc., R. R. Co.*, 32 Conn. 579; *Hinchman v. Paterson Horse R. R. Co.*, 17 N. J. Eq. 75; *Jersey City, etc., R. R. Co. v. Jersey City, etc., Horse R. R. Co.*, 20 N. J. Eq. 61; *Cincinnati, etc., Street R. W. Co. v. Cumminsville*, 14 Ohio St. 523; *Hobart v. Milwaukee City R. R. Co.*, 27 Wis. 194; *S. C. 9 Am. R.* 461; *Attorney General v. Metropolitan R. R. Co.*, 125 Mass. 515; *Brown v. Duplessis*, 14 La. An. 842; *Savannah and Thunderbolt R. R. Co. v. The Mayor, etc.*, 45 Ga. 602; *Peddicord v. Baltimore, etc., R. W. Co.*, 34 Md. 463.

In the recent case of *Hiss v. Baltimore, etc., R. W. Co.*, 52 Md. 242 (S. C. 36 Am. Rep. 371), express and full approval is given to the doctrine maintained by Judge DILLON and by Judge COOLEY. The Supreme Court of Iowa has very recently given this general subject a thorough consideration in the case of *Stanley v. The City of Davenport*, 54 Iowa, 463, and it was there held that a municipal corporation had no authority to grant a right to a street railway to use steam as the motor power, but it was conceded that ordinary horse rail-

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ways might be operated upon the streets without imposing an additional burden upon the owner of the fee.

The question has been so fully discussed in the cases and text-books to which we have referred that nothing of importance or of interest can be added. The rule sustained both by principle and authority is, that a horse railway may be placed and operated upon the streets of a municipal corporation without increasing the burden of the servitude, and that the owner of the fee is not entitled to compensation because of such use of the streets upon which his property abuts.

Judgment affirmed.

No. 8461.

FRISBIE ET AL., TRUSTEES OF CLARKSVILLE, v. FOGG ET AL.

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149	313

TOWN.—*Constitutional Law*.—The act of June 17th, 1852, amendatory of the charter of Clarksville, as far as it authorizes the new trustees for which it provides, to sue for and receive the funds derived from the sale of lots under the charter of 1783, granted by Virginia, does not impair the obligation of any contract, and is valid.

SAME.—*Mandamus*.—*School Law*.—Mandamus lies by an officer to compel the delivery, by his predecessor, of the records, books and papers of the office, and to compel the payment of money which the officer is required by law to apply to school purposes, the needs of which may require the prompt application of the money.

From the Clark Circuit Court.

J. H. Stotsenburg, for appellants.

A. Dowling, for appellees.

MORRIS, C.—The appellants, who were the plaintiffs below, allege in their complaint, that they are the trustees of the town of Clarksville, in Clark and Floyd counties, Indiana, duly elected and appointed as such, pursuant to, and in all respects in accordance with, "An act amendatory of the charter of

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Clarksville," approved June 17th, 1852. The times and manner of their election and qualification are stated with much particularity, and shown to be in conformity to said amendatory act.

It is then averred that the appellees call themselves the trustees of the town of Clarksville, and that they have in their possession, or subject to their control, the books, papers and other property of said town, and especially a fund belonging to said town, consisting of money which arose from the sale of the lots of said town by the gentlemen, trustees of the same, who were nominated for that purpose by the General Assembly of the State of Virginia in 1783, prior to the cession of the territory northwest of the Ohio river to the United States; that the said fund was to be applied by said gentlemen, trustees, in such manner as they should judge most beneficial to the inhabitants of said town; that such application of said funds had never been made.

That it is provided by the 16th section of the schedule, annexed to the present constitution of the State of Indiana, that "The General Assembly may alter or amend the charter of Clarksville, and make such regulations as may be necessary for carrying into effect the objects contemplated in granting the same; and the funds belonging to said town shall be applied according to the intention of the grantor." That the funds belonging to said town, for said purpose, now in the hands of the appellees, or subject to their control, amount to over twelve thousand dollars, all of which ought of right to be applied in the manner provided for by the act of June 17th, 1852, under which the appellants are acting as trustees; that before the commencement of this suit, and so soon as the board of trustees was organized, the plaintiffs, as such trustees, called upon the appellees, who are the late trustees and officers of said town, and the only persons having said funds in their possession, or under their control, and demanded of them the surrender to the plaintiffs, as such trustees, of all the books, papers and property of every description in their possession

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belonging to said town, but that the appellees then and there refused, and still refuse, to surrender the same to the appellants. The plaintiffs below prayed that an alternative writ of mandate might be issued against the appellees, requiring them and each of them to surrender to the appellants the books, papers and funds belonging to said town, in their possession or subject to their control, or in the possession or subject to the control of either of them, or show cause to the contrary.

The complaint was duly verified by the appellants. An alternative writ of mandate, reciting the complaint, was issued in due form by the court, requiring the appellees to surrender the books, papers and property in their possession, belonging to said town, to the appellants, or show cause why they should not.

The appellees appeared and demurred to the writ for the following reasons:

First. Because the said plaintiffs have not capacity to sue.

Second. Because said alternative writ does not state facts sufficient to constitute a cause of action.

The court sustained the demurrer and rendered final judgment for the appellees. The plaintiffs appealed and assign as error the sustaining of said demurrer.

The question presented by the record for decision is, have the appellants, as the trustees of the town of Clarksville, a right to the possession of the books, papers and funds belonging to the town, or the right to the possession of any of them?

The town of Clarksville, embracing within its boundaries 1,000 acres of land, was laid out as a town under an act of the State of Virginia in 1783. At that time the State of Virginia claimed to be the owner of the territory northwest of the Ohio river, embracing the State of Indiana. The Assembly of Virginia granted to "Col. George Rogers Clark, and the officers and soldiers who assisted in the reduction of the British posts in the Illinois," one hundred and fifty thousand acres of land on the northwest side of the Ohio river. By a statute of Virginia, passed in 1783, a board of commissioners

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was created for the purpose of locating and surveying the grant. It was made the duty of this board to lay out "one thousand acres at the most convenient place" in said grant, "for a town." By the 2d section of said act it was provided, "that a plat of the said one thousand acres of land laid off for a town, shall be returned by the surveyor to the court of the county of Jefferson, to be by the clerk thereof recorded; and thereupon the same shall be and is hereby invested in William Fleming, John Edwards, John Campbell, Walker Daniel, George Rogers Clark, John Montgomery, Abraham Chaplin, John Bailey, Robert Todd, and William Clark, gentlemen, trustees, to be by them, or any five of them, laid off into lots of half an acre each, with convenient streets, and public lots, which shall be and the same is hereby established a town by the name of Clarksville."

It was further provided in the 2d section of said act, "That after the said lands shall be laid off into lots and streets, the said trustees, or any five of them, shall proceed to sell the same, or so many as they shall judge expedient, at public auction, for the best price that can be had, * * * and the money arising from such sale, shall be applied by said trustees in such manner as they may judge most beneficial for the inhabitants of the said town; * * * and, in case of the death, removal out of the county, or other legal disability, of any of said trustees, the remaining trustees shall supply such vacancies by electing others, from time to time, who shall be vested with the same powers as those particularly nominated in this act." 1 G. & H. 723.

In the case of *Carr v. McCampbell*, 61 Ind. 97, the court, in speaking of the act of the State of Virginia of 1783, says:

"It is a part of the history of this State, of which we take notice, that this grant of land by Virginia to the officers and soldiers of Col. George Rogers Clark's Illinois Regiment, sometimes called 'Clark's Grant,' and sometimes the 'Illinois Grant,' was surveyed and located adjacent to the falls of the Ohio river, lying chiefly in Clark county, but extending west-

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ward into Floyd county, and northward into Scott county, in this State; and that the town of Clarksville was located and laid out in the two counties of Clark and Floyd, and abutting on the Ohio river."

By the cession of the territory northwest of the Ohio river to the United States, the jurisdiction of the State of Virginia over the same ceased, and by the admission of Indiana into the Union as a State, sovereign jurisdiction, except for national purposes, over the town of Clarksville, passed to and vested in her.

By the 16th section of the schedule of rights annexed to the present constitution of the State, it is provided that "The General Assembly may alter or amend the charter of Clarksville, and make such regulations as may be necessary for carrying into effect the objects contemplated in granting the same; and the funds belonging to said town shall be applied according to the intention of the grantor."

The only charter which the town of Clarksville had, at the time of the adoption of the present constitution, was that provided by the statute of Virginia, hereinbefore referred to. It is obvious, therefore, that the purpose of section 16 of the schedule was to authorize such legislation as might be necessary to carry into effect the objects contemplated by the Virginia statute of 1783, and to secure the application of the money arising from the sale of the lots in the town to purposes intended to be promoted by Virginia, the grantor, as expressed in said act.

The act of June 17th, 1852, was passed with the view of accomplishing the purposes suggested by the 16th section of the schedule to the constitution. Its title is, "An act amendatory of the charter of the town of Clarksville, in Clark and Floyd counties." The 1st section provides: "That the number of trustees for said town shall be hereafter limited to three, to be elected in the manner following, to wit: One to be appointed by the board doing county business for the county of

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Clark, who shall be a resident of said county ; one to be appointed by the board doing county business for the county of Floyd, to reside within said last named county ; and the third to be elected by the qualified voters residing within the bounds of said town of Clarksville, who shall be a householder and resident voter within the same, who shall severally continue in office for one year after their election, and until successors are duly elected and qualified, which election shall be made annually on the first Monday in September."

The 3d section provides that such trustees, when so elected, "shall be vested with all the powers and perform all the duties incident to said office of trustee, heretofore possessed and performed by their predecessors, together with such other powers and duties as may be prescribed by law. They shall appoint a secretary, treasurer, marshal, with such other officers and agents as may become necessary for the transaction of their business." They are authorized to adopt by-laws for the government of the corporation.

By the 4th section, the trustees are authorized to prescribe the duties of the officers appointed by them, and fix their compensation.

The 5th section provides that, "So soon as the said board shall be organized and qualified, the said trustees shall forthwith call upon the late trustees and officers of said corporation, and demand of them the surrender up to said new trustees of all the books, papers and property of every description in their possession belonging to said corporation ; and if not surrendered on demand they are hereby vested with all the necessary authority to compel the same by due process of law."

The 6th and subsequent sections of the act provided for the application of the funds which may come into the hands of the trustees, to school purposes, and need not be particularly noticed.

It is alleged that one of the appellants was appointed a trustee by the board doing county business for the county of Clark, and that he resided in said county ; that another was

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appointed by the board doing county business in the county of Floyd, who resided therein; that the third was elected by the voters of said town of Clarksville, and that he was a householder and resident voter within the same.

It would seem to follow from the facts stated in the complaint and admitted by the demurrer, that the capacity of the appellants to sue, as the trustees of the town of Clarksville, is beyond question, unless, indeed, the act of June 17th, 1852, is invalid and void.

It is insisted by the counsel for the appellees, that in so far as the act of June 17th, 1852, authorizes, or attempts to authorize, the appellants, as trustees of the town of Clarksville, chosen pursuant to its terms and acting under its provisions, to demand or recover from the appellees any part of the funds described in the complaint and writ, it is in violation of the constitution of the United States and of this State. The appellees claim that, under the act of Virginia, they, by accepting the trust therein created, became vested with the legal title to the 1,000 acres of land, and that the State of Indiana had no power to divest them of the title so acquired; that, by accepting the title they entered into a contract with the State of Virginia, the obligations of which can not be impaired by State legislation or constitutional amendment; that to divest them of the custody, control and management of the money arising from the sale of lots in the town of Clarksville, would not only impair but destroy said contract, and defeat the intention and purpose of the State of Virginia in creating the trust. It may be conceded, that if the act of June 17th, 1852, will have the effect to impair the obligation of any contract made between the State of Virginia and the appellees, it is so far void.

But it is quite clear that the donation of the 1,000 acres of land was made by the State of Virginia for the benefit of the inhabitants of Clarksville, and not for the benefit of the trustees in whom the legal title to said land was vested. It may also be assumed as indisputably true, that the trustees took

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the title upon the condition that they would discharge the trust, and faithfully dispose of the land and apply the proceeds as directed by the act creating the trust and vesting the title. Where, as is charged in this case, the trustees have ignored, for almost a century, the trust, and failed to apply the money received to the uses and purposes for which it was intended, they may be removed and required to pay over to new trustees the money held by them in defiance of the rights of the *cestui que trust*. Perry on Trusts, sections 275, 276, 281, and cases cited by him.

Whatever control the State of Virginia, through its courts or otherwise, might have exercised over the trustees nominated in the act of 1783, before the cession of the Northwest Territory to the United States, might be legitimately exercised by the State of Indiana, at any time since its organization as a State.

It was obviously the purpose of the act of June 17th, 1852, to provide for the application of the funds which had arisen from the sale of lots in Clarksville to the purposes contemplated by the act of Virginia. The complaint in this case shows that lots in said town had been sold, and that some \$12,000 had been received by the appellees from such sales, which had never been applied in accordance with the law. It charges the appellees with having abused their trust, and with misapplying the trust funds, and asks that they shall pay over to the appellants, as the legally chosen representatives of the inhabitants of said town, the trust fund, that they may apply it to the use and for the benefit of the inhabitants of the town in the construction of a school-house and in payment of the tuition of their children. Had the appellees applied the funds as received for the benefit of the inhabitants of Clarksville, the trust would have been executed long ago, and the donees would have been in the enjoyment of the fund. Through the appellants, as their legally constituted trustees, they now demand the fund, that it may be applied for their benefit. Upon the facts stated, we think the appellees should respond by a

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surrender of the funds so long withheld by them from those for whose use they were intended.

Assuming as we do, that the act of June 17th, 1852, is valid, do the facts stated in the writ entitle the appellants to the relief demanded, or to any part of it? The demurrer admits the facts stated in the writ, so far as they are well pleaded. It admits that the appellants are the trustees, properly elected and qualified, of the town of Clarksville; that they, as such trustees, demanded of the appellees, before the commencement of these proceedings, the books, papers and property in their possession, belonging to the town of Clarksville; it admits that the appellees had in their possession, books, papers and property belonging to said town, and that, upon demand, they refuse to surrender the same to the appellants, as trustees of said town; it further admits that the appellees claimed to be the former trustees of said town, and that, as such, they had possession of books, papers and money belonging to the town of Clarksville. Upon these facts are the appellants entitled to the surrender to them, in this proceeding, of the books, papers and money, or either of them? If entitled to the books, or to the books and papers, though not to the money, the demurrer to the writ should have been overruled.

It is, we think, quite clear that the proper and appropriate remedy to recover the books and papers belonging to the town of Clarksville is the one adopted in this case. "Wherever the term of an officer has expired, he may be compelled by mandamus to turn over to his successor all records and books pertaining to his office to which the public are entitled to access. And the writ may even be granted for this purpose in aid of the person declared duly elected to the office." *High on Extraordinary Legal Remedies*, section 74.

DILLON says: "Mandamus * is a proper remedy for the duly elected officer of a municipal corporation to obtain possession of the seal, books, papers, and records appertaining to such office, from his predecessor." *Dillon Munic. Corp.*, section 684.

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There can be no doubt, we think, that the facts stated in the complaint entitled the appellants to the books and papers belonging to the town of Clarksville.

In the case of *Commonwealth v. Comm'rs of Allegheny County*, 37 Pa. St. 277, Justice THOMPSON says:

"Mandamus is a high prerogative and remedial writ, the appropriate functions of which are the enforcement of duties to the public, by officers and others, who either neglect or refuse to perform them. It follows, therefore, that those to whom it may be appropriately directed, owe some duty to the public, and are under obligation to perform it; and for the enforcement of which there is no other specific legal remedy."

The appellees, since the passage of the act of June 17th, 1852, have held the funds of the town of Clarksville, according to the averments of the complaint, in trust for the education of the children of the town, for by the act the funds are devoted to school purposes. They owed some duty to the public as to those funds. It was their duty under the law, upon the expiration of their term of office, to pay over to the officers chosen to secure the same, the funds belonging to said town for the benefit and tuition of the children living therein, and to deliver to their successors the books, papers and records of said town; and this was a part of their official duty. It is an implied condition, annexed to every office, that the incumbent shall, at the expiration of his term of office, pay over to the person appointed by law to receive them the public funds which may have come into his hands as such officer. It may possibly be said that it is to be presumed that the appellants, as trustees, had appointed a treasurer of said town, and made it his duty to receive and hold said funds. But nothing of this kind is alleged in the complaint. It states that the appellants are, as trustees of the town, entitled to the funds sued for, and the act of June 17th, 1852, expressly authorized them to sue for and recover the same by due process of law.

In the case of *Johnson v. Smith*, 64 Ind. 275, in which the appellants sought to compel the appellee, by mandamus, to pay

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over to them, as school trustees of Monroe City, funds which had come into his hands improperly, belonging to the school corporation of Monroe City, the court say :

“ Whatever sums of money the appellee had received, by reason or on account of the school children, residing within the territorial limits of the school town of Monroe City, or transferred thereto for school purposes, the appellants, as soon as they had qualified and organized, as by law required, as the trustees of said school town, had the right to demand and receive from the appellee, and he could not lawfully withhold it upon any ground. He held and had received the money in trust for the tuition of those children, and the appellants alone, as the trustees of the school town, had the right under the law to apply and disburse the money to and for the purpose for which it was intended.”

The above language might be applied literally to the case before us.

Whatever sums the appellees received from the sale of lots in Clarksville, were held by them in trust for the tuition of the children of Clarksville ; the appellants, as soon as qualified and organized as the trustees of said town, had a right to demand and receive such funds, and the appellees could not lawfully withhold such funds on any ground. They held such funds in trust for the school children of Clarksville, and the appellants, as the trustees of said town, had the right, under the law, to apply and disburse the funds for their benefit.

It may be said that, in the case from which we have just quoted, as well as in the case now in hearing, the trustees might have sued for and recovered the money in an ordinary action under the code, and that, therefore, this proceeding for the money can not be sustained. The law gives no specific remedy in this case, nor can it be said that an action under the code would be adequate. The necessities which might call for the prompt disbursement of school funds, and the unsecured condition of the money, might render an action under

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the code inadequate and insufficient. It has been repeatedly held, that, where there is a clear legal right in the relator, the writ will not be refused merely because there is a remedy in equity, or a remedy at law, if it is applicable to the purpose. *The Indianapolis, etc., R. R. Co. v. The State*, 37 Ind. 489.

We think the demurrer to the complaint should have been overruled.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellees,

78	280
139	276
78	280
143	184

No. 9098. .

DAY v. THE SCHOOL CITY OF HUNTINGTON.

PRACTICE.—*Supreme Court.*—*Appeal.*—*Lapse of Time.*—*Dismissal.*—Lapse of time for the taking of an appeal to the Supreme Court may be pleaded in bar of the appeal; or the question may be raised on motion.

SAME.—*Disability of Appellant.*—A motion to dismiss an appeal not taken in time will be sustained, unless the appellant shows that he was under disability.

SAME.—*Agreement for Submission.*—An agreement by the appellee for the submission of the cause, entered on the transcript more than a year before the filing thereof, does not affect the appellee's right to move for a dismissal of the appeal because not taken in time.

From the Huntington Circuit Court.

L. P. Milligan, A. Moore and T. L. Lucas, for appellant.

W. H. Trammel, B. F. Ibach, N. B. Taylor, F. Rand and E. Taylor, for appellee.

WOODS, J.—The appellee has moved to dismiss the appeal because not taken within the time allowed by law.

The judgment was entered on the 8th day of November, A.

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D. 1877, and the transcript was filed in this court on the 24th day of November, A. D. 1880. By the act of March 14th, 1877, Acts 1877, Spec. Sess., p. 59, it was required that "Appeals in all cases hereafter tried must be taken within one year from the time the judgment is rendered; in all cases, heretofore tried, must be taken within one year from the time this act takes effect; but the time allowed the appellant, by the pre-existing law, shall not be enlarged. Where the appellant is under legal disabilities, at the time the judgment is rendered, he may have his appeal at any time within one year after the disability is removed."

In the case of *Buntin v. Hooper*, 59 Ind. 589, it was said: "With a view to simplicity and facility of practice, and the early disposition of causes improperly appealed after the time limited therefor, we have concluded to dispose of such questions on motion, upon due notice to the opposite party. This is not intended, however, to prevent the appellee, if he shall see proper to do so, from pleading the lapse of time in bar of the appeal. In this case, it is not shown that the appellant was under any disability, and the appeal must be dismissed."

So, in the case now before us, it is not shown or claimed that the appellant was under any disability.

The agreement for the submission of the cause on appeal, which was endorsed on the transcript more than a year before the filing of the transcript in this court, does not affect the question raised by the motion to dismiss. It is, therefore, immaterial to consider whether the agreement was made by an authorized agent or attorney of the appellee.

The appeal is dismissed, at the costs of the appellant.

Johnson v. Gibson.

No. 8339.

JOHNSON v. GIBSON.

MORTGAGE.—Contract.—Construction.—Corporation.—A mortgage executed by G., describing himself as president of a turnpike corporation, mortgaging the road of the corporation, and containing a covenant to pay the sum secured, which was, in fact, given to secure a loan to the corporation, and was given and accepted as the instrument of the corporation, will, *it seems*, be so held, and not the instrument of the person whose name it bears.

SAME.—After the mortgagee had, in a suit against the corporation, obtained against it a foreclosure and personal judgment for the debt, he will be bound by the construction which he has thus placed upon the instrument.

SAME.—Pleading.—Corporation.—An answer in such case, which shows the use of a name importing a corporation, the exercise of corporate franchises, a dealing with it by the plaintiff as such, that he was an officer of it, and obtained a judgment against it, sufficiently shows the existence of the corporation, without a direct averment that it was a corporation.

From the Shelby Circuit Court.

J. B. McFadden, J. W. Tomlinson and E. S. Stilwell, for appellant.

A. Major and S. Major, for appellee.

ELLIOTT, C. J.—Appellant sued the appellee upon a mortgage reading as follows:

“I, Cartaline N. Gibson (President of the Brandywine, Boggstown and Sugar Creek Extension Turnpike Company), of Shelby county, State of Indiana, mortgage and warrant to Eli Johnson the following real estate situate in Shelby county, Indiana, to wit: Brandywine, Boggstown and Sugar Creek Extension Turnpike Road, to secure the payment of \$672.62, due June 1st, 1872, interest at 10 per cent., payable quarterly, and the mortgagor expressly agrees to pay the sum of money above named without relief from valuation laws. In witness whereof, the mortgagor has hereto set his hand and seal this 26th day of December, 1870.

(Signed)

“C. N. GIBSON,
President Brandywine, Boggstown and Sugar Creek Extension Turnpike Co.”

78	283
126	176
78	283
130	4
78	283
132	72
132	224
78	283
143	20
78	283
144	164
147	436
78	283
154	570
78	283
157	335

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Appellee's answer alleges that the mortgage was executed for money borrowed by, and applied to the use of, the turnpike company; that appellant was a director of said company and well knew for what purpose the money was borrowed and used; that the mortgage was executed by the appellee as the president of said company, and in the company's behalf; that it was taken by the appellant, not as the mortgage of the appellee, but as that of the turnpike company; that the money obtained upon the mortgage was paid by appellant to the treasurer of said company, and was used in the construction of the company's road. It is also alleged that the appellant instituted an action upon the said mortgage against the Brandywine and Boggstown Extension Turnpike Company, as the maker of said mortgage, obtained a decree for the sale of the road therein described to satisfy the sum of \$728.67, principal and interest due upon the said mortgage; that the appellant also recovered a personal judgment in said action against the corporation for the said sum, and that the judgment and decree are in full force.

Appellant demurred to this answer, the court overruled the demurrer, appellant elected to stand upon his demurrer, and the court gave judgment for the appellee. From this judgment appellant appeals.

Appellant insists that the mortgage created a personal liability against the appellee, and cites, as sustaining his proposition, the following cases: *Hays v. Crutcher*, 54 Ind. 260; *Aimen v. Hardin*, 60 Ind. 119; *Pearse v. Welborn*, 42 Ind. 331. Appellee contends that the mortgage is that of the corporation, and that no cause of action is, therefore, shown against him upon the promise contained in the mortgage. Counsel cite, as supporting his contention, *Pitman v. Kintner*, 5 Blackf. 250 (33 Am. Dec. 459); *Mackenzie v. The Board, etc.*, 72 Ind. 189; *Gaff v. Theis*, 33 Ind. 307; *Pearse v. Welborn, supra*; *Means v. Swormstedt*, 32 Ind. 87. We do not, however, feel called upon to decide whether the mortgage, considered apart from all the other circumstances, is that of the corporation, or that of

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the appellee individually. The case comes to us upon the answer, and upon the answer we decide it. The answer states a complete defence. It clearly shows that the mortgage was executed as the mortgage of the corporation, upon property which the corporation owned; that it was accepted as the mortgage of the corporation; that appellant paid the money to a corporate officer; that it was used with his knowledge for corporate purposes; that, with full knowledge of all the facts he sought and obtained against the corporation, not merely a decree of foreclosure, but also a personal judgment upon the promise embodied in the mortgage. The appellant has, in the clearest and most emphatic manner, given a construction to the contract. He can not "blow both hot and cold with reference to the same transaction." The case falls within the rule sanctioned in *Aimen v. Hardin*, 60 Ind. 119. It was there said by WORDEN, J: "The note would seem to have been the note of the company, and not that of the directors who signed it. The promise was made by them as directors of the company, and not as individuals. *Pearse v. Welborn*, 42 Ind. 331. See, also, *Hays v. Crutcher*, 54 Ind. 260. But, if the point were doubtful, the plaintiff herself has put a practical construction upon the note, by treating it as the obligation of the corporation, and not that of the individuals who signed it as directors. She has sued the corporation upon it, and obtained judgment. It is said, in a late work by a well-known legal writer, that, 'In a doubtful case, the interpretation which the parties themselves have, by their conduct, practically given their contract will prevail.' Bishop Con., section 598." The doctrine declared in the case from which we have quoted is one often declared and enforced. *Morris v. Thomas*, 57 Ind. 316; *Bell's Adm'x v. Golding*, 27 Ind. 173; *Crabb v. Atwood*, 10 Ind. 322; *Chicago v. Sheldon*, 9 Wal. 50.

In the mortgage on which appellant's case is founded, there is but one mortgagor and one promise. In the most solemn manner known to the law, he has obtained a judgment that the mortgage is that of the corporation, and he ought not now

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to be allowed to insist upon a different construction of the contract. The construction which the court gave the contract at his solicitation was that which he had himself given it, and he is not in a situation to aver that it was not the correct one.

It is urged in a supplemental brief filed by the appellant, that the answer does not show that there was any such corporation as the Brandywine, Boggstown and Sugar Creek Extension Turnpike Company. This question is really disposed of by what has already been said. The appellant has recognized the existence of the corporation and has treated it as having executed the very contract upon which he now sues, and can not now deny its existence. *Baker v. Neff*, 73 Ind. 68. But, more than this, the answer shows the use of a corporate name, the existence of corporate organization, and the exercise of corporate functions in which the appellant as a corporate officer participated. This abundantly shows corporate existence. Indeed, the rule is that where the pleading shows the name to be such as imports a corporation, it will be sufficient. *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527; *MacKenzie v. The Board, etc.*, 72 Ind. 189.

Judgment affirmed.

No. 8133.

CATES v. BALES ET AL.

VENDOR AND PURCHASER.—*Contract.*—*Rescission.*—*Fraud.*—A purchaser of property can not rescind the contract for fraud so long as he retains the property, if of any value.

SAME.—*Pleading.*—*Answer.*—*Value of Property.*—*Offer to Return.*—An answer seeking to avoid the payment of the price of property purchased, on the ground of fraud, which does not aver that the property was of no value, or does not aver a return or an offer to return the property, is insufficient on demurrer.

78	285
194	289
78	285
167	541

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SAME.—Consideration.—Copyright.—Insurance Plan.—A court can not say that the transfer of an instrument for the organization of insurance companies is of no value, as the vendor of such property, before publication, if not copyrighted, is entitled to control its disposition.

SAME.—Instruction.—An instruction, that the transfer of a plan for the organization of insurance companies is of no value because there is no law in this State authorizing the formation of such companies, is erroneous.

INSTRUCTION.—Evidence.—Issues.—Practice.—Supreme Court.—An instruction, which is not applicable to any evidence admissible under the issues, is erroneous, and will reverse the case, although the evidence is not in the record.

From the Randolph Circuit Court.

E. L. Watson, J. S. Engle and L. W. Study, for appellant.

A. O. Marsh, A. Gullett and W. A. Thompson, for appellees.

BEST, C.—This action was brought by the appellant against the appellees, upon a note of \$125, made by them to one Seth Symons and by him endorsed to the appellant.

Each defendant filed a separate answer of two paragraphs, and both united in an answer of three paragraphs.

Demurrers for want of facts were overruled to the second and third paragraphs of the joint answer, and a reply in denial was filed.

The issues were submitted to a jury and a verdict returned for the appellees. A motion for a new trial was overruled, and a judgment rendered upon the verdict. The appellant appeals, and assigns as error that the court erred in overruling the demurrers to the second and third paragraphs of the answer, and in overruling the motion for a new trial.

The appellant, in his brief, concedes that the second paragraph of the answer is good, and this will not be noticed.

The third averred in substance, that the payee of the note sued upon was engaged in organizing an insurance company in Randolph county, Indiana, during the month of October, 1876, under the following agreement and plan, viz.:

“We, the undersigned, agree to form ourselves into a mutual insurance association, for the protection of our property against damages by fire and lightning, to be known as The

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Farmers' Insurance Association of ——— county, and of State ———. We bind ourselves and our property to pay five dollars as an initiation fee, to defray the expenses of getting up this organization; and we bind ourselves and our property to be assessed when a fire occurs to any amount not to exceed the amount we each have insured, the per cent. to pay the damages of any fire that may accidentally occur and the expenses of such notification by the actuary. No money to be paid except the initiation fee until a fire takes place, then we agree to pay the assessment within thirty days after the fire, into the hands of the actuary of the association, who shall pay said assessment to the persons damaged. The initiation fee to be paid to the person who gets up the organization. When any member of the association shall dispose of his property by sale or otherwise, he shall notify the actuary of the fact. He will be held responsible for the assessment of any fire that may occur until such notification has been received by the actuary." That under said plan the following agreement was written, viz.: "Each of us, whose names are subscribed below, agree to be one of one hundred or more freeholders, in Randolph county, and State of Indiana, to form an association upon the above plan and for the above purpose, under the specifications named therein as above; *provided, however*, that the signature shall in no case be binding on us if the above number is not obtained in our county to effect an organization.

"Names.

Postoffice address."

That said Symons was the agent of said Mendinhall, and, to induce the makers to execute the note sued upon, represented to them that said Mendinhall had obtained a copyright of the agreement and plan above set out; that he had the exclusive right to use such plan in organizing insurance companies in Randolph county, Indiana; that he had already obtained the signatures of more than one hundred freeholders of said county to said agreement; that they had met, organized as a corporation, and were then ready to do business; that, if

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the appellees would purchase said right to said county, they would have the exclusive right to organize such companies therein ; that they could easily obtain additional names to such agreement, and would be entitled to five dollars for each additional name obtained. It was further averred that they were ignorant of the insurance business and of the manner of organizing such companies, but, relying upon the representations so made by said Symons, they purchased said right, which was duly transferred to them by written assignment, and they executed said note "in consideration of the sale to them of said right to said copyright in Randolph county, Indiana, and the right to organize said insurance companies in said county on said plan, and receive five dollars for each member thereof, and the right to procure and add additional names * * * to said association, and to receive five dollars for each member so added, and for no other consideration whatever, when, in truth and in fact, said Symons had not procured the names of one hundred freeholders of said county as members of said association, and said association was not a corporation, and is not now and was not ready for business, and these defendants did not have the exclusive right to use said form of agreement and organize insurance companies on said plan in Randolph county, and receive five dollars initiation fee therefor from each person who became a member thereof, and they did not have the right to receive five dollars for each member added to the association, which said Symons represented organized."

It will be observed that there is no averment that the appellees returned, or offered to return, the right assigned, or that it was of no value, and for that reason it is insisted that the paragraph in question is insufficient. The purchaser of property, who has been induced to make the purchase by fraud, has an election of remedies. He may retain the property, and, when sued for the purchase-money, may set up the fraud as a defence. If the injury sustained by the purchaser be equal to or greater than the purchase-money, he may de-

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feat the action entirely. He may, if he choose, rescind the contract, and thus defeat an action for the purchase-money. In the latter case, however, he must show a return of the property, or an offer to return it, or that it was of no value. *Love v. Oldham*, 22 Ind. 51.

He can not, however, rescind the contract, and thus defeat the action, so long as he retains the property, if of any value. The plea under consideration avers the fraud, but it does not aver that the right purchased was of no value, nor does it aver an offer to return it, and it was, therefore, insufficient.

In *Hardesty v. Smith*, 3 Ind. 39, the court, in discussing the sufficiency of a similar plea, says: "Though that plea alleges fraud, still it does not aver that the right purchased was of no value, and shows no offer to return it to the vendor. The contract has not been rescinded, and the defendant retains an article which, according to the plea, we must regard as of some value. He has no right, therefore, wholly to preclude the plaintiff from his action, though he may, perhaps, avail himself of the fraud, if it exist, in mitigation of damages."

The appellees insist that, though the plea does not aver that the right was without value, it is sufficient as a plea of no consideration. In support of this position it is urged, 1st. That the instrument mentioned in the answer is not authorized by law to be copyrighted, and for that reason it furnished no consideration for the note. 2d. If authorized to be copyrighted, a partial assignment of the same is unauthorized, and such an assignment furnishes no consideration for the note.

The plea admits the transfer of the instrument in question, and, unless we can say that it was of no value whatever, we can not say that the answer was good as a plea of no consideration. This we can not do. The instrument was either copyrighted, or it was not. If it was, the presumption, in the absence of an averment to the contrary, is, that it was of some value. If it was not copyrighted, it belonged to the

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vendor, and his right until publication to control its disposition was of some value.

Drone on Copyright, at page 111, says: "Property may exist in that which has no commercial value. A person may own a useless swamp, a barren crag, or a sterile waste so worthless that he can not give it away; yet it belongs to him, and the law will aid him in preventing another from appropriating it, or otherwise unlawfully using it. The same is true of intellectual property. A manuscript may be void of literary qualities, a painting destitute of merit, a statue without art excellence, yet it may be valued by the owner; and, whether it is or not, he has a right to say that it shall not be made public, or used without his consent."

The transfer of this right may furnish a sufficient consideration for the note. Whether the instrument was or was not copyrighted, we can not say that its transfer was of no value, and therefore can not hold the plea good as a plea of no consideration.

Again, the nature of the plea assumes that there was a consideration for the note sued upon, and seeks to avoid its payment by alleging that it was fraudulently procured. This is done without an averment that the property was returned, or offered to be returned, or that it was of no value, and we will, therefore, treat it as an answer seeking to avoid a contract procured by fraud, and not as a plea of no consideration. As such it was not sufficient.

The appellant complains of the tenth and eleventh instructions given to the jury.

The eleventh informed the jury, that if they found that the note was supported by a sufficient consideration, they should then consider the third paragraph of the joint answer, which was in the nature of a counter-claim, and under it the defendants were entitled to such damages as they had proved. This is not the language but the substance of the instruction. This was wrong. The third paragraph of the answer was not pleaded as a counter-claim, nor were the defendants entitled

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to prove or recover any damages under it. There could be no evidence offered under this or any other paragraph of the answers that rendered this instruction proper, and it must, therefore, reverse the case though the evidence is not in the record. *Lindley v. Dempsey*, 45 Ind. 246.

By the tenth charge the court said to the jury that the copyright secured to Mendinhall was property of more or less value in States where the law authorized the formation of such companies, but as there was no law in this State, at the time of the assignment, authorizing the formation of fire insurance companies upon the plan secured to Mendinhall, a promise to pay for the right to use the same where it could not be used would be without consideration, and if they believed that the only consideration for said note was the assignment of said copyright, they should find for the defendants.

This was error. Where a party gets all he knowingly contracts for, he will not be allowed to say that he gets no consideration. *Baker v. Roberts*, 14 Ind. 552; *Neidefer v. Chastain*, 71 Ind. 363.

In *Hardesty v. Smith*, 3 Ind. 39, this court said: "The simple parting with a right which is one's own, and which he has the right to fix a price upon, must be a good consideration for a promise to pay that price. In such cases, the purchaser gets a something, and he is estopped by the exercise of his own judgment, uninfluenced by fraud, or warranty, or mistake of facts, at the time, to afterward say it was not worth to him what he agreed to give."

The court erred in giving each of these instructions and in overruling the demurrer to the third paragraph of the answer, for which the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellees' costs, with instructions to grant a new trial, sustain the demurrer to the third paragraph of the joint answer, and for further proceedings, etc.

Everhart v. The Terre Haute and Indianapolis Railroad Company.

No. 8718.

EVERHART v. THE TERRE HAUTE AND INDIANAPOLIS
RAILROAD COMPANY.

NEGLIGENCE.—*Railroad.—Pleading.*—A complaint against a railroad company, to recover for personal injury, showed that the plaintiff, who was casually passing, at the request of an employee of the defendant, got upon a car that was moving slowly upon a switch, and applied the brakes to stop it, and, while so engaged, other servants of the defendant carelessly caused other cars of the defendant to collide violently with that which the plaintiff was upon, by reason of which the injury occurred.

Held, that the plaintiff must be regarded as a mere intermeddler, to whom the defendant owed no duty, either as employee, passenger, or traveller on an intersecting highway, and that the complaint was bad on demurrer.

From the Marion Superior Court.

C. P. Jacobs, for appellant.

J. G. Williams, B. Harrison, C. C. Hines and W. H. H. Miller, for appellee.

WORDEN, J.—Complaint by the appellant against the appellee in two paragraphs. The first alleges "that the defendant is a corporation, organized under the laws of the State of Indiana, and, as such, owns and operates a railroad line from Indianapolis to Terre Haute, Indiana, and also certain lines of track laid down and used for switching and making up freight and passenger trains in the city of Indianapolis, Indiana; that, on the 20th day of August, 1879, the plaintiff (who is a minor) was returning home along South West street, in said city, and, on coming to the point where the tracks of the defendant cross said West street, was stopped by several flat or coal cars, which were moving slowly across said street; that at this moment a servant and employee of the defendant, who was employed on and about said switching tracks, requested the plaintiff to get upon one of said coal cars and apply the brake thereto, so as to bring it to a full stop; that the plaintiff acceded to this request, and got upon one of the said coal cars, and laid hold of the brake wheel thereof, to do as

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he had been requested; that certain other employees of the defendant, who had charge of a switching engine belonging to the defendant, to which were attached some other empty coal cars, undertook to make what is known as a running switch, and carelessly, negligently, wilfully and recklessly cut off several coal cars from the engine, which, under a considerable speed, ran on eastward, and wilfully, recklessly, carelessly and negligently left them without any brakeman or other person to take care of them or stop them, and thus left alone they ran into and collided heavily with the car on which the plaintiff was, and the shock threw the plaintiff off and upon the ground and under said cars, and the cars ran against and upon him, mangling him severely, without the fault or negligence of the plaintiff, and in a manner which he was powerless to prevent; that, in the crush of the wheels created by the collision aforesaid, the bones of his right foot were broken and mashed, his right leg skinned for a considerable distance, his left foot badly bruised, and a deep gash cut in his groin, and he has been ever since confined to his bed, and has suffered and still suffers great pain and anguish therefrom. He is informed and believes that these injuries are of a permanent character, and that his left foot is crippled for life, and that he will be confined to his bed for many months to come. * * * He further avers that the loosening of said cars from the engine on the running switch was so sudden that he could take no means to avoid the injury, as the cars were upon him before he could see or provide for the danger."

The second paragraph alleges the organization of the defendant as a corporation under the laws of the State of Indiana, and that, as such corporation, it "owns and operates a railroad line leading from Indianapolis westward across White river, and also certain lines of track used principally for switching and as side tracks, which have been laid down in and upon a public street in the city of Indianapolis, called Louisiana street, and along the same from Tennessee street to White river, within the limits of said city; that at a point

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or place on said Louisiana street, a certain other street of said city, called West street, crosses said Louisiana street, and the said crossing has been filled with railway tracks, main and side tracks, and from thence westward to said White river, upon and along which the defendant's engines and cars are almost constantly moving, attached to coal and freight cars; that on the 20th of August, 1879, the plaintiff (who is a minor) was returning home and walking upon the sidewalk of South West street in said city of Indianapolis, and coming to its intersection with said Louisiana street, across which his route lay, was walking carefully across said last-named street, and when about two-thirds of the way across said Louisiana street, found his progress barred by several empty coal or flat cars, which were slowly moving westward, entirely without any person to manage or stop them, and unattached to any engine; that, as plaintiff stopped, a servant and employee of the defendant, who was engaged at the time in looking after and oiling the defendant's cars upon and along said tracks, directed the plaintiff to climb upon said empty cars and apply the brakes to them and stop them; plaintiff did so without any delay, and while the cars were slowly moving westward along one of the tracks aforesaid, applied the brakes with all his force to stop the car he was on; that during this time certain servants and employees of the defendant, in charge of one of the defendant's switching engines, were engaged in moving and switching cars therewith at the western extremity of Louisiana street, near the bridge over White river, where the side or switching tracks join or unite with the main track used by the defendant, and with said engine pushed certain empty flat coal cars from the west of the said junction down upon the side track on which were the cars, upon one of which the plaintiff was standing, and at the brake thereof, and wilfully, recklessly and negligently allowed said coal cars to run upon and along said track, disconnected and cut off from the engine that had started them, entirely wild and without any person upon them to control the brakes thereof, and at a dan-

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gerous rate of speed, and the motion they had thereby acquired drove and propelled them swiftly, and all unseen by and without the knowledge of this plaintiff, who was engaged at the time in tightening the brakes on the car he was upon, and suddenly ran against the cars on which the plaintiff was riding, with great force, and the shock of the collision threw the plaintiff off the car and upon the track and under the wheels of the cars, which ran upon him, wounding him in several places, and mangling his foot as hereinafter set forth. And the plaintiff says he had no reason to expect, and did not expect, and did not know, that the defendant's agents or servants, or any other person, would allow said cars to be pushed along and upon said side track, from the west end thereof, while the car he was on was moving along said track westward, nor that they would push said cars down said track, and disconnect them from the engine, and allow them to run wild and unattended by any person to manage the brakes thereon, nor that any cars were coming, until they were so near as to make a collision inevitable; that he had no means or knowledge whereby he could foresee the danger, and that it came so suddenly upon him that he was unable to prevent it. He avers that he was not guilty of any negligence or carelessness at or before the time of the collision, and that, as soon as he was aware of the danger, he used every effort to prevent it, but without success. He says that if the cars approaching from the west had been properly manned by a sufficient number of persons to apply the brakes in time, the collision would have been prevented, and that if the defendant's agents or employees in charge of the switch engine had taken proper care, and the means at hand to know whether the track was clear, the injury to the plaintiff would not have happened; that if the defendant's servants in charge of the engine had not pushed the cars down the side track with great speed, and wilfully and recklessly suffered them to run wild and unattended, the collision would not have taken place; that, in getting upon the car to stop it by the use of the brake, he did so

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solely at the request of the defendant's servant and employee as aforesaid, and without any reward or remuneration, or promise or expectation of any reward or remuneration."

The paragraph then proceeds to allege the extent of the plaintiff's injuries, and the expenses incurred, and claims judgment in the sum of \$20,000.

A demurrer to each paragraph of the complaint for want of sufficient facts was sustained and final judgment rendered for defendant. Judgment affirmed on appeal to general term.

On the authority of the cases of *Degg v. Midland R. W. Co.*, 1 H. & N. 773, *Flower v. The Pennsylvania R. R. Co.*, 69 Pa. St. 210, and *New Orleans, etc., R. R. Co. v. Harrison*, 48 Miss. 112, cases which seem to us to be entirely in point in principle, we feel constrained to hold that on the facts stated the defendant is not liable, and, therefore, that the ruling below was right.

If the plaintiff were to be regarded as having been the servant of the defendant, it would seem that he could not recover for the injury caused by the negligence of his fellow servants. But it seems to us, that on the facts stated in either paragraph of the complaint he can not be regarded as having been the servant of the defendant. See *Kelly v. Johnson*, 128 Mass. 530. He was not requested or directed to man the brake by any one that is shown to have had authority from the defendant to make such employment.

In the first paragraph it is alleged that "a servant and employee of the defendant, who was employed on and about said switching tracks," requested the plaintiff to get upon one of the cars and apply the brake, etc.; and in the second paragraph it is averred that "a servant and employee of the defendant, who was employed at the time in looking after and oiling the defendant's cars upon and along said tracks," directed the plaintiff, etc.

The plaintiff was a mere volunteer, consenting, at the request or direction of an employee of the defendant, to perform service which should have been performed by the employees

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themselves ; and, while he can not be regarded as an employee, he is in no better condition than if he had been.

Nor is he in any better condition legally than if he had been a mere intermeddler, undertaking to perform the service without request or direction from any one, because, as we have seen, he was not requested or directed to get upon the car and apply the brake by any one having power from the defendant to authorize him to do so. The defendant owed him no duty either as an employee, passenger or traveller upon a highway crossed by the railroad. Under the circumstances, the authorities above cited make it clear that the defendant is not liable.

If there had been an urgent necessity for some one other than an employee of the defendant to get upon the car or cars and apply the brakes, in order to prevent a destruction of human life or valuable property, possibly the case might be different ; but no such necessity was shown.

The judgment below is affirmed, with costs.

No. 7285.

TIMMONS v. WIGGINS.

PROMISSORY NOTE.—*Pleading.*—*Title.*—A complaint upon promissory notes, which fails to aver to whom the notes are payable, is bad upon demurrer, as it does not show any title in the plaintiff to the notes.

SAME.—*Possession.*—*Evidence.*—*Fraudulent Agreement.*—A complaint in such action, which averred that possession of the notes sued upon was obtained by the defendant by trick, connivance and fraudulent practices, is not supported by proof that they were voluntarily surrendered in pursuance of a fraudulent agreement.

From the Benton Circuit Court.

T. N. Bunnell and R. P. Davidson, for appellant.

G. O. Behm and A. O. Behm, for appellee.

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BEST, C.—The appellee brought this suit, and his cause of action was thus stated in the first paragraph of the complaint: "The plaintiff complains of the defendant, and says that, on the 18th day of August, 1874, the defendant, by his three several promissory notes—one for \$205, at thirty days after date, one note for \$205, at sixty days, and one for \$106.79, at ninety days—promised to pay said notes as they should become due, with interest at ten per cent. per annum from date, and also to pay plaintiff's attorney fee. And he also shows that said defendant, by trick, connivance and fraudulent pretences, obtained possession of said notes and has refused to give them up to the plaintiff, so that copies can not be filed herein. And the plaintiff alleges that said notes remain wholly unpaid. Wherefore," etc.

The second was upon an account.

A demurrer for want of facts was overruled to the first paragraph.

An answer of three paragraphs was then filed:

1st. A general denial;

2d. Payment; and,

3d. That the plaintiff and the defendant, in December, 1875, had settled and adjusted all matters between them, including the notes mentioned in the complaint, and the plaintiff, upon such settlement, voluntarily surrendered said notes to the defendant as being paid in full.

A reply in denial was filed to the second and third paragraphs of the answer.

The issues were submitted to a jury, and a verdict returned for the appellee for \$711.06. The plaintiff remitted \$47.40, and, over a motion for a new trial, judgment was rendered upon the verdict for \$663.66.

The appellant appeals, and insists that the court erred in overruling the demurrer to the complaint and in overruling the motion for a new trial.

Among other objections urged to the complaint, it is insisted that it is defective because it is not averred to whom

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said notes were payable. This objection is well taken. It will not be presumed that they were payable to order or bearer in a bank in this State, and as it is not averred that they were payable to the plaintiff, he does not show any title in himself. There is nothing averred in the complaint to indicate that said notes were not payable to and obtained by the defendant from some person other than the plaintiff. It is true that the complaint contains this averment, "and also to pay plaintiff's attorney fee;" but this can not be construed to mean that the plaintiff is the payee, as such averment is as applicable to him as assignee as payee. If the notes contained stipulations to pay attorney fees, these were promises to pay such fees to any person instituting suit upon them; and, if any person other than the payee should institute such suit, the averment in question would apply to him as well as to the payee. This averment, therefore, does not indicate to whom the notes were payable, and without such averment the complaint was insufficient.

In *White v. Joy*, 13 N. Y. 83, the complaint averred that the defendants, "by a promissory note in writing, for value received, promised to pay the sum of one thousand dollars one year after the said date. And the same was thereupon transferred to the said plaintiff, who is now the holder and owner thereof. The payment of said note was duly demanded at maturity. The said defendants have never paid the said note, or any part thereof, but are jointly indebted to the plaintiff therefor. Wherefore," etc. The court said: "The complaint is defective in not stating to whom the promissory note mentioned in it was made payable. It is not merely the want of a sufficiently definite statement, the remedy for which is by motion under section 160 of the code, but it is an attempt to set out the substance of a promissory note, omitting all notice of the payee, and not mentioning whether it had that essential feature or not. If the complaint had been demurred to, we should have been obliged to give judgment for the defendant."

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These remarks apply to this complaint, and for the reasons given we think the demurrer should have been sustained.

The motion for a new trial was made upon the ground, among others, that the verdict was not sustained by sufficient evidence.

It appears from the testimony of the plaintiff, that he and Benjamin A. Timmons, defendant's father, were in partnership in the grocery business from May, 1874, until August of the same year; that at that time he sold his interest in the stock on hand to the defendant, for which the notes in suit were executed; that in December, 1875, the plaintiff and the defendant had a settlement of the partnership affairs of the plaintiff and Benjamin A. Timmons, in which the notes were surrendered to the defendant, and the defendant and Benjamin A., as the firm of Timmons & Timmons, were to pay the firm debts of the plaintiff and Benjamin A. Timmons. He further testified that they did not and would not pay said debts, and that for such reason he was not willing to stand by the settlement. He offered no proof of a demand of the notes before bringing the suit, and the defendant testified that none was made. He also testified that the plaintiff, on the 11th of August, 1877, "told him to bring the notes over, but did not ask for them nor say he wanted them." There was no proof of fraud, mistake or error of any kind, but simply a failure and refusal to carry out the terms of such settlement. The testimony of the other witnesses did not substantially change the case made by the plaintiff's testimony.

The averment in the complaint, that the "defendant, by trick, connivance and fraudulent pretences obtained possession of said notes," furnished an excuse for not filing the notes, or copies of them, with the complaint, but did not authorize the plaintiff to prove that a settlement made by him and the defendant, in pursuance of which the notes had been surrendered, was brought about by fraud, mistake or error of any kind, for the purpose of setting aside such settlement. The averment, fairly construed, meant that the defendant had pos-

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session without right, and not that he had possession by virtue of an agreement fraudulently procured. Proof of the latter would not support an averment of the former. A settlement procured by fraud is binding until set aside. This will not be done without averment and proof. If the settlement is binding, the notes are extinguished. If it may be set aside for fraud, the facts which authorize it must be averred in order to maintain a suit upon the notes. Without expressing an opinion upon the ultimate rights of the parties, we will merely say that the evidence did not support the complaint, and for that reason a new trial should have been granted.

For these reasons the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is in all things reversed, at appellee's costs, with instructions to grant a new trial, to sustain the demurrer to the first paragraph of the complaint, and for further proceedings.

No. 8460.

DAVIS v. FOGG ET AL.

CLARK'S GRANT.—*Clarksville.*—*Action Against Trustees by Inhabitants.*—*Parties.*—A citizen and taxpayer of the town of Clarksville, suing for himself and the other inhabitants thereof, can not maintain an action in his own name, for the management and application of the fund belonging to the town, derived from the sale of lots, under the direction of the court, neither the corporation nor its trustees or officers being made parties, and the complaint containing no allegation of any official default or dereliction of duty on their part, or that they have refused to sue.

From the Clark Circuit Court.

J. H. Stotsenburg, for appellant.

A. Dowling, for appellees.

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MORRIS, C.—The appellant, on behalf of himself and the inhabitants of the town of Clarksville, brought this suit against the appellees, as the pretended trustees of said town, charging them with having in their hands a fund belonging to the town, derived from the sale of lots by certain commissioners appointed for that purpose by the Legislature of Virginia, in 1783. The complaint is, in substance, the same as that in the case of *Carr v. McCampbell*, 61 Ind. 97, except that, in this case, nothing is said about the town of Ohio Falls, and the appellant prays that the appellees be required to give bond for the security of the fund, and that, under the direction of the court, they be compelled to apply it for the benefit of the inhabitants of said town as contemplated by the statute of Virginia, passed in 1783.

The appellees demurred to the complaint. The demurrer was sustained, and judgment rendered for the appellees.

The sustaining of the demurrer is assigned as error.

We think the court did not err in sustaining the demurrer. If the appellees have, as alleged in the complaint, the possession of funds derived from the sale of the lots in the town of Clarksville, such fund, under the act of June 17th, 1852, belongs to said town. The facts stated may show that the town, through its trustees, is entitled to sue for and recover this fund, but they do not show that the appellant is entitled to maintain this action. There is no allegation in the complaint of any official default or dereliction of duty on the part of the town or its officers in relation to this fund, nor that it or they have refused, upon proper application, to sue for and recover it. Neither the corporation nor its trustees or officers are made parties to the suit. Under such circumstances, a citizen and taxpayer of the town can not, we think, maintain an action in his own name, for the management and application of the fund. Were it shown that the appellees were the trustees of the town, an action against them to account should be brought in the name of the corporation, unless it appeared in the complaint, that, for sufficient reason, this could not be

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done. *Brown v. Vandyke*, 8 N. J. Eq. 795. But it is alleged that the appellees were not, though they claimed to be, the trustees of the town of Clarksville. We think, upon the facts stated, no cause of action exists in favor of the appellant. *Carr v. McCampbell*, *supra*.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

No. 7702.

ANDERSON v. DONNELL.

INSTRUCTION.—*Reference to Complaint in General Terms.—Practice.*—In an instruction submitting an issue arising upon the sale and payment for eleven mules, a reference to the mules as a “lot of mules,” without indicating the number designated in the complaint, was not too general. The complaint containing the precise number was already before the jury, to aid the reference to it with exactness.

EVIDENCE.—*Lost Receipt.—Practice.*—If a trial court erred in striking out a party's testimony in his own behalf as to the execution and contents of a lost receipt, the subsequent admission of the party and the person who gave it, to testify to its execution, cured the error.

From the Rush Circuit Court.

L. Sexton and *C. Cambern*, for appellant.

J. D. Miller, *F. E. Gavin*, *G. B. Sleeth* and *J. W. Study*, for appellee.

NIBLACK, J.—This action was brought by William A. Donnell against James W. Anderson and John A. Maddux, upon a complaint averring facts which may be briefly stated as follows:

That in the year 1870 the said Donnell and Maddux were partners in the business of buying and selling real estate and other property for the purposes of trade and speculation; that, during the existence of the partnership, they purchased two

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tracts of land, one from Chaney McKay, for the sum of \$300, and the other from Ralph Charles, for \$600; that, in obedience to the terms of the partnership, Donnell executed his promissory notes for those sums of money to the said McKay and Charles respectively; that afterward the said Donnell and Maddux, as such partners, sold to Anderson eleven mules, in consideration of which he, Anderson, promised to pay and discharge the notes executed by Donnell, as above, to the said McKay and Charles; that Anderson had paid and taken up the McKay note, but had wholly failed and refused to pay and take up the Charles note, by reason of which Donnell had been compelled to pay, and had paid, the same, with the interest due thereon; that Donnell and Maddux had dissolved their partnership, and that by the terms of its dissolution Donnell had become the sole owner of the claim against Anderson.

Maddux was made a defendant only to answer to his interest in the claim, and made no defence to the action. Anderson answered in general denial.

Verdict in favor of the plaintiff, assessing his damages against Anderson at \$912.14. Motion for a new trial denied and judgment on the verdict.

Anderson is the only appellant, no judgment having been either demanded or taken against Maddux.

The only questions discussed by counsel are such as arose upon the motion for a new trial.

The ground upon which the appellant based his defence was, that, instead of buying the mules of the firm of Donnell & Maddux, and agreeing to pay the McKay and Charles notes as alleged, he had, in fact, bought them of Maddux individually, and paid Maddux for them in full.

The appellant, as a witness in his own behalf, testified that he had purchased the mules of Maddux, explaining the circumstances under which he claimed the purchase had been made; that he had paid Maddux in full for the mules, giving the items which had entered into the contract price and con-

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stituted such full payment. He also stated that, upon settlement with Maddux concerning the mules, he, Maddux, had executed to him a receipt for the price of them, alleging the loss of that receipt and giving his recollection of the words which it contained.

Upon the appellee's motion, so much of the appellant's testimony as related to the receipt was struck out, and the action of the court in that respect is complained of here as having been erroneous.

Whether, if the receipt had been offered in evidence, it would have been properly admissible, we need not decide, as that question is not now before us in such a way as to require a decision upon it. The appellant was afterward, in connection with other portions of his evidence, permitted to testify to the execution of the same receipt to him by Maddux, and to put Maddux on the stand as a witness to corroborate him as to the fact that such a receipt had been given. Conceding, therefore, without deciding, that the court erred in striking out what the appellant first said concerning the receipt, the error was fully cured by the subsequent proceedings.

The court, of its own motion, gave to the jury six instructions in writing.

The first instruction was merely preliminary to those which followed, and assumed only to give a synopsis of the facts averred in the complaint, and of the answer which had been filed in the cause. It referred to the mules, which were charged to have been delivered to the appellant under a contract for the payment of the McKay and Charles notes, as a "lot of mules," without indicating the number designated in the complaint.

The appellant contends that this reference to the mules was too general, and tended to impress upon the minds of the jury that the precise number of mules which may have been delivered to the appellant was immaterial. Authorities are cited in support of the doctrine contended for by the appellant, but these authorities have reference to executory, and not to ex-

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ecuted, contracts, and do not sustain the objection urged by him to the instruction complained of. The complaint was before the jury, and for the purpose for which the instruction referred to its averments, it was unnecessary that the reference should be in more than general terms. Besides, the precise number of mules, which had been sold and delivered to the appellant, was not made an important question at the trial, the real contest being as to the person or persons from whom, and the terms upon which, the appellant had purchased the mules. Taken as a whole, we see nothing in the instructions injurious to the appellant.

The appellant further contends that the verdict was not sustained by the evidence.

The evidence was irreconcilably conflicting, and, as to the question of the greater credibility, the jury had necessarily to decide as between several of the witnesses. There was evidence tending to sustain all the material allegations of the complaint. Under such circumstances, we are not permitted to disturb the verdict upon the evidence.

The judgment is affirmed, with costs.

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133 697

No. 9572.

NEWCOME v. WIGGINS, RECEIVER, ET AL.

PARTNERSHIP.—Real Estate.—Husband and Wife.—Parties.—Receiver.—In an action by the wife of a surviving partner against a receiver of the firm who has sold real estate as partnership property and has the proceeds in court, to recover one-sixth of such proceeds, on the ground that the real estate was owned by her husband and his deceased partner as tenants in common, the purchasers of such property are neither proper nor necessary parties.

SAME.—Wife's Interest in Proceeds.—Estoppel.—In such case the wife having been a party to the proceedings of the receiver, instituted to obtain an order to sell the real estate as partnership property, is concluded by

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the judgment, and so long as it remains in force can not claim any portion of the proceeds of the sale.

JUDGMENT.—*Action to Set Aside.*—*Practice.*—*Complaint.*—A complaint to set aside a judgment taken against a party through his surprise, inadvertence or excusable neglect, need not be verified.

SAME.—*Parties.*—*Waiver.*—If all persons who were parties to the former proceedings should not be parties to such application to set aside the judgment, a failure to demur for such reason is a waiver of the objection.

SAME.—*Pleading.*—*Complaint.*—A complaint, in such application, under section 99 of the code, 2 R. S. 1876, p. 82, showing that the judgment was taken through a party's excusable negligence, and that he has a meritorious defence, is sufficient.

From the Wayne Circuit Court.

W. A. Bickle, for appellant.

H. C. Fox, *W. D. Foulke* and *J. L. Rupe*, for appellees.

BEST, C.—The appellant commenced this suit against Andrew S. Wiggins, receiver of the late firm of R. & F. G. Newcome, and thirty-two other persons.

In the complaint it was substantially alleged that from the 1st day of January, 1861, until the 25th day of September, 1876, Robert and Franklin G. Newcome, brothers, were in partnership, in the milling business, in Hagerstown, Wayne county, Indiana; that, on the day last named, Robert died, and at his death said firm owned some real and personal property, and was indebted in a large sum, the amount of which was unknown to the plaintiff; that, at the time of Robert's death, he and Franklin G. Newcome owned a large amount of other real estate as tenants in common, which is specifically described in the complaint, and which it is averred was not partnership property, nor purchased with partnership means, nor used for partnership purposes; that the plaintiff is now, and for a great many years has been, the wife of Franklin G. Newcome, who, as surviving partner, in November, 1876, obtained an order from the Wayne Circuit Court to sell the property mentioned in the complaint as partnership property, for the payment of partnership debts, but that she was not a party to such proceedings, and is not bound by such order. It is

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also averred that Andress S. Wiggins, on the 9th of March, 1878, was duly appointed receiver of the effects of said firm, and at once entered upon the discharge of the duties of his trust; that afterward he filed an application in the Wayne Circuit Court for an order to sell all of said property as the property of said firm, and made the plaintiff, Franklin G. Newcome, her husband, and Franklin G. Newcome, Jr., the minor son of Robert Newcome, deceased, and his only heir, parties defendants thereto; that, immediately after the summons was served upon her, the said Wiggins notified her that she need not appear to said proceeding, as her rights were not intended to be affected, and would not be; that she was merely a nominal party, and that her rights would be protected; that, relying upon such statements, she did not appear to said action, nor did she authorize any one to appear for her, and she did not learn for more than one year thereafter, that her interests were affected, or that said property was adjudged to be partnership property as against her; that, at the expiration of such time, she first learned such fact, and also learned that W. W. Woods, an attorney of said court, had filed an answer for her, alleging that such property was not partnership property, but was held by her husband and his deceased brother as tenants in common; that a demurrer was sustained to such answer and an exception reserved.

It is further averred that the receiver, in pursuance of said order, sold the various parcels of land embraced in the complaint, some of which was purchased by each of the thirty-two persons mentioned therein, and all was sold for its full value; that the persons who purchased the same paid the full value, under the belief that it was partnership property, and that the plaintiff had no interest in it; that, by reason of such sales, her interest therein has become absolute, and that she is entitled to the undivided one-sixth part thereof, but, as the purchasers of said land paid the full value of the same, she is willing to accept her interest in money, and relinquish her title to said land; that the receiver has the money in court,

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more than sufficient to satisfy her claim, and is about to distribute the same to the creditors of said firm; that one-sixth of the money for which said lands were sold does not, in equity, belong to the creditors of said firm, and that its payment to her will not reduce the fund out of which their claims should be paid. She further alleges that the judgment so taken against her by the receiver was taken against her through her mistake, inadvertence and excusable neglect; that the court erred in sustaining the demurrer to her answer and in rendering judgment against her. Prayer, that the receiver be directed to pay her one-sixth of the money for which said lands sold, or, if the facts do not entitle her to such relief, that the judgment in favor of the receiver be set aside, and that she be allowed to defend, or, if she is not entitled to such relief, that the judgment be reviewed and reversed for error apparent of record, and for other relief.

Copies of the proceedings by the surviving partner and by the receiver are filed with the complaint, and marked exhibits "A," "B," "C," "D," "E," "F," "G" and "H."

Exhibit "D," omitting the title of the cause and court, was as follows: "Andress S. Wiggins, receiver, heretofore appointed by the court for the late firm of R. & F. G. Newcome, comes and shows to the court that Robert Newcome died at this county intestate, on the — day of —, 187—, a member of the firm of R. & F. G. Newcome, and that by his death said firm was dissolved; that said Robert left surviving him as his only heir-at-law his son Franklin G. Newcome, Jr.; that said firm of R. & F. G. Newcome were the owners of the real estate described in schedule 'A,' hereto attached and made part hereof, as partnership property of said firm; that at the November term, 1876, of the Wayne Circuit Court, a petition was filed in said court by Franklin G. Newcome, a surviving partner of said firm, making Elizabeth Newcome and Franklin G. Newcome and the only heir-at-law of Robert Newcome, deceased, parties thereto, and alleging that said real estate was the partnership property of R. & F. G. New-

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come, and that the heirs of said Robert Newcome and the said Elizabeth Newcome had no interest therein until after the payment of the debts of said R. & F. G. Newcome; and upon said petition and in the proceeding therein the court so found and adjudged. And said receiver further alleges that the said firm of R. & F. G. Newcome is insolvent, and that it will require the sale of all the property of said firm to pay the debts thereof; and he further says that there remains in his hands, as such receiver, the real estate of R. & F. G. Newcome, which is particularly described in the paper marked 'A,' hereto attached and made a part hereof, and that said real estate should be sold for the payment of the debts due from said firm, and the receiver prays the court for an order to sell said real estate, and all thereof, upon such terms as the court shall fix and designate, and the said Franklin G. Newcome, Elizabeth Newcome, his wife, and Franklin G. Newcome, Jr., be each required to appear and answer herein as to any interest they may have or hold in said real estate or be forever debarred therefrom."

Schedule "A" contains a description of the lands embraced in the plaintiff's complaint.

Exhibit "F" was the answer of the appellant herein. The answer admitted that the defendant Elizabeth was the wife of Franklin G. Newcome; that her husband and Robert Newcome had been partners until the 25th day of September, 1876, when the death of the latter dissolved the firm; that at that time they owned the real estate mentioned in schedule "A," but it was averred that they owned the same as tenants in common, and not as partnership property; that, as the wife of said Franklin G. Newcome, she had an inchoate interest in the undivided one-sixth part thereof, and that she did not consent that said interest should be sold for the payment of the debts of said firm. Prayer accordingly.

A demurrer for want of facts was sustained to this answer, to which an exception was reserved and a final judgment rendered, adjudging that the property was partnership property,

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and ordering the receiver to sell it for the payment of the debts of said firm.

Exhibit "A" was the petition of Franklin G. Newcome, as surviving partner, to sell a portion of the land embraced in schedule "A." Exhibit "B" was the answer of the guardian *ad litem* of Franklin G. Newcome, Jr.; and exhibit "C" was the judgment ordering the sale of said property for the payment of debts of said firm, neither of which need be set out more fully.

Andress S. Wiggins appeared and demurred to the complaint for the following reasons:

"1st. That the court has no jurisdiction of the person or of the subject of the action.

"2d. That the plaintiff has not legal capacity to sue.

"3d. That there is another action pending between the same parties for the same cause of action.

"4th. That there is a defect of parties plaintiffs.

"5th. That there is a defect of parties defendants.

"6th. That the last amended complaint does not state facts sufficient to constitute a good cause of action.

"7th. That several causes of action have been improperly united."

This demurrer was sustained, and, the plaintiff declining to further plead, final judgment was rendered against her.

From this judgment the appellant appeals, and insists that the court erred in sustaining the demurrer to the complaint.

The record does not show that the thirty-two other defendants took any steps in the case, but as the parties agree that each defendant filed a similar demurrer which was sustained, to which a like exception was reserved, and express a wish that the record shall be so regarded, we will thus treat it.

These demurrers were properly sustained. No facts entitling the plaintiff to any relief against these thirty-two purchasers were averred. If the property in dispute was partnership property, these purchasers had no interest in the fund, nor in its disposition. If it was not, this fact might have

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been ground for complaint by them, but could not possibly constitute a cause of action against them in favor of the appellant. Nor were they necessary or proper parties in such controversy between the appellant and the receiver, as such controversy could be settled as well without as with them. The appellant does not claim, nor do we think the complaint states facts which entitle the plaintiff to a partition of the lands as against these purchasers, and, therefore, we do not think it stated any cause of action against them or either of them. If it can be thus regarded, it is bad, for the reasons hereinafter given why it did not state facts which entitle the plaintiff to any portion of the fund in the hands of the receiver. These demurrers were, therefore, properly sustained.

The facts stated in the complaint do not, as we think, entitle the appellant to a judgment for any portion of the fund in the hands of the appellee Wiggins. The complaint stated that Robert and Franklin G. Newcome owned the lands mentioned as tenants in common; that the plaintiff, as the wife of Franklin G., had an inchoate interest in the undivided one-sixth part thereof, which had become absolute by a judicial sale; that they had been sold for their full value to purchasers who bought and paid for them without any notice that the appellant had an interest in them, and, had the complaint gone no further, we are not prepared to say that the facts thus stated would not entitle the appellant to the relief sought. The complaint, however, goes further. It states that the appellee instituted a suit against the appellant, her husband, and Franklin G. Newcome, Jr., alleging that the property in question was partnership property; that she was made a party, and that it was adjudged, in such proceeding, that said property was the partnership property of the firm of R. & F. G. Newcome, and that it was necessary to sell the same to pay the debts of said firm. These averments are material. From them it appears that the question of fact, as to whether this land was or was not partnership property, was determined adversely to the appellant in the other proceeding. So long

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as that judgment remains in force, it concludes the appellant, Without getting rid of it, she can not again controvert that question.

In *McCaffrey v. Corrigan*, 49 Ind. 175, a similar question was decided. The action was brought to foreclose a mortgage alleged to have been executed by a married woman and her husband, to secure the payment of the purchase-money of such real estate. Judgment of foreclosure and sale of the property. After the death of the husband, the wife brought an action for partition against the purchasers of such foreclosure sale, claiming one-third of the land as surviving wife. The defendants relied upon the judgment as an estoppel, and the plaintiff replied that the mortgage was not, in fact, given for purchase-money. The court said: "The question is not now whether, in fact, the mortgage was for the purchase-money of the land, of which the plaintiff is now claiming the one-third. That question was settled by the judgment of the court in the foreclosure case, to which the plaintiff was a party. She might then have controverted that fact, had she been inclined to do so, and had the fact been otherwise than as alleged. But we think she can not now, in this way, controvert that fact. Compare *v. Hanna*, 34 Ind. 74; *Gavin v. Graydon*, 41 Ind. 559; *May v. Fletcher*, 40 Ind. 575; *Fischli v. Fischli*, 1 Blackf. 360."

The fact adjudged against the appellant in the proceeding by the appellee is the same fact which she seeks to controvert in this suit, and this, we think, she can not do in this way. The averments in the complaint, that she has an interest in said lands which has become absolute by judicial sale, do not control the averment that such fact has been otherwise adjudged in a proceeding to which she was a party. If the latter had first been brought forward in an answer, the same would have been sufficient, and the fact that they appear in the complaint does not impair their force. However pleaded, they show that the fund arose from the sale of partnership property, to no part of which has the appellant any claim until the debts

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of the firm are fully paid. For these reasons, we think the appellant was not entitled to any part of said fund.

The appellant also insists that, if the facts stated do not entitle her to a judgment for a portion of the fund, the complaint was good as an application to set aside the judgment obtained by the receiver against her, under section 99 of the code. The latter part of that section reads thus: "The court may also in its discretion allow a party to file his pleadings after the time limited therefor; and shall relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise or excusable neglect, and supply an omission in any proceedings on complaint or motion filed within two years."

The appellee insists that the complaint is not sufficient for such purpose, for the following reasons:

1st. The complaint was not filed within two years after the rendition of the judgment;

2d. The complaint is not verified; and,

3d. The action is not between the same persons who were parties to the action in which the judgment was rendered.

The first objection is not true in point of fact. This suit was commenced on the 15th day of November, 1880, and the judgment was rendered in June, 1879. The complaint was filed in time.

The second objection can not be sustained, as the statute does not require the complaint to be verified. We have been referred to *Buck v. Havens*, 40 Ind. 221, *Lake v. Jones*, 49 Ind. 297, *Nord v. Marty*, 56 Ind. 531, and *Bristor v. Galvin*, 62 Ind. 352, as settling the practice, but none of them hold that the complaint must be verified. In *Buck v. Havens*, it was said that "The practice very justly requires the party who seeks to be released from a judgment to show that he has a meritorious cause of action or defence, as the case may be, which is involved in the judgment from which he seeks to be relieved, and this should be supported by his affidavit." This merely requires a showing, and this showing may be by verified complaint or by a separate affidavit. However made, its

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office is to prove the averment, and not to render it sufficient. Manifestly, a complaint is as good without as with a verification, unless the statute requires it. If an unverified complaint is supported by an affidavit upon the hearing, this is equivalent to a verification. This need not be done, if the opposite party admits that the facts averred are true. This he does by his demurrer; and "This," in the language of this court in *Nord v. Marty*, *supra*, "was tantamount, in our opinion, to a submission of the cause to the court below for a hearing on the facts set out in the verified complaint." No showing was necessary.

The objection, that the action is not between the persons who were parties to the judgment, is equally untenable. The statute does not require it in terms, and, if it could be so construed, the failure to demur to the complaint for defect of parties, naming them, was a waiver of the objection. *Marks v. The I., B. & W. R. W. Co.*, 38 Ind. 440; *Durham v. Bischof*, 47 Ind. 211.

It is further insisted that the judgment should not be set aside, as it does not appear that the appellant can avoid in any way the judgment rendered against her in the proceeding instituted by her husband, and for that reason she will be unable to make any defence to the action brought by the receiver. This is assuming as true what the latter avers. This we can not do, especially since the appellant alleges that she was not summoned, nor did she appear or authorize any one to appear for her, and that no judgment was rendered against her in such proceeding. Again, it appears from the record that only a small portion of the land embraced in the receiver's complaint was included in the proceedings of the surviving partner, and as to the excess the appellant may make a defence. However this may be, the complaint avers a meritorious defence, and this is sufficient.

It is not claimed that the facts averred do not show "excusable negligence," and we think they clearly show that the judgment was thus taken. *Hunter v. Francis*, 56 Ind. 460; *Nord v. Marty*, 56 Ind. 531.

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As the complaint was sufficient under section 99, the demurrer by the receiver was improperly sustained, for which the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things reversed as to the receiver, and affirmed as to the other appellees, with instructions to overrule the demurrer of the former, to apportion the costs, and for further proceedings.

No. 9877.

JETT v. CITY OF RICHMOND.

CONSTITUTIONAL LAW.—*Cities and Towns*.—Section 1640, R. S. 1881, which forbids cities and towns from punishing by ordinance any act which is a public offence by statute, is constitutional. If not embraced in the subject expressed in the title of the act of which it forms a part, it is at least properly connected with that subject.

From the Wayne Circuit Court.

A. C. Lindemuth, for appellant.

W. D. Foulke and *J. L. Rupe*, for appellee.

WORDEN, J.—The appellant was prosecuted by the city before the mayor of Richmond, for a violation of a city ordinance, passed in 1870, of the following tenor, viz. :

“If any person shall appear in any public part of the city, or in any place of public resort or amusement therein, or within two miles thereof, in a state of intoxication, every such person so offending shall, on conviction before the mayor, be fined in any sum not less than \$1 nor more than \$25.”

The mayor sustained a demurrer to the complaint and rendered judgment for the defendant, and the city appealed to the circuit court, where a demurrer to the complaint was again filed for want of sufficient facts, among other things, and

78	316
145	459
78	316
171	660

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overruled. Exception; plea not guilty; trial by the court; finding and judgment for the plaintiff.

The appellant has assigned error upon the overruling of the demurrer to the complaint.

The question involved depends upon the provisions of the Revised Statutes of 1881.

In the "act concerning public offences and their punishment," is found the following provision, viz.:

"Whoever is found in any public place in a state of intoxication shall be fined any amount not exceeding \$5; and, upon a second conviction for such offence, he shall be fined not more than \$25; and upon a third conviction for such offence, he shall be fined not more than \$100, may be imprisoned in the county jail not more than thirty days nor less than five days, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period." R. S. 1881, section 2091.

In the act prescribing the mode of procedure in criminal cases, entitled "An act concerning proceedings in criminal cases," the following provision is found, viz.:

"Whenever any act is made a public offence against the State by any statute and the punishment prescribed therefor, such act shall not be made punishable by any ordinance of any incorporated city or town; and any ordinance to such effect shall be null and void, and all prosecutions for any such public offence as may be within the jurisdiction of the authorities of such incorporated cities or towns, by and before such authorities, shall be had under the State law only." R. S. 1881, section 1640.

The purpose of the above provision is apparent. It is to prevent persons being punished twice for the same offence, once under the State law, and again under a city or town ordinance.

But it is claimed that the title to the act is not broad enough to cover the enactment in question, and, therefore, that it is void. We, however, are of a different opinion. The title, we

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have seen, is "An act concerning proceedings in criminal cases." The provision, that cities and towns shall not punish by ordinance an act made punishable by a State law, if not embraced by the title, which would seem to be the case, because it concerns proceedings in criminal cases, is germane to the subject expressed in the title, and properly connected with it, and is sufficient to satisfy the requirement of the constitution.

The provision in question, it seems to us, is properly and appropriately connected with the subject of proceedings in criminal cases, if, indeed, it does not constitute a part of that subject.

Many authorities have been cited upon the point by the respective counsel, but we deem it unnecessary to reproduce them here. The following are some of those which support the view which we take of the question: *Bright v. McCullough*, 27 Ind. 223; *McCaslin v. The State*, 44 Ind. 151; *The State v. Tucker*, 46 Ind. 355; *Fletcher v. The State*, 54 Ind. 462.

The fact that a civil action is brought by the city to recover the penalty inflicted by such an ordinance as that in question, and others of a similar character, does not make the penalty inflicted any the less a punishment. The form of the action to recover the penalty is entirely immaterial so far as the question we are now considering is concerned. The penalty thus inflicted, and recovered in the form of a civil action, the process being a warrant for the arrest of the defendant, and imprisonment being a means of coercing payment, is as much a punishment within the meaning of section 1640 as if the form of the action were criminal instead of civil.

The provision in question takes away the right of cities and towns to maintain actions, civil in form, in certain cases; but it is not therefore obnoxious to any constitutional objection, for civil and criminal matters may be embraced in the same act, where they are the subject of the enactment or properly connected with it. *Thomasson v. The State*, 15 Ind. 449.

Section 2091, above quoted, provides for the punishment

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of the same act mentioned in the ordinance in question, and section 1640 abrogates the ordinance.

The demurrer to the complaint should have been sustained.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

No. 8371.

PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY v. LAUFMAN.

RAILROADS.—Duty to Fence, in Towns and Cities.—Railroad companies are liable for animals killed within towns and cities between the crossings of streets and alleys, if the road could be and is not fenced at the place of the killing.

SAME.—Exceptions to Rule.—It is not for the courts to create exceptions to the statutory rule on the subject.

From the Grant Circuit Court.

N. O. Ross, for appellant.

R. W. Bailey and *A. Diltz*, for appellee.

WOODS, J.—The appellee obtained a judgment against the appellant for the value of a horse, killed upon the track of the appellant's road at a point where the same was not fenced; and the question presented for decision is, whether the road ought to have been fenced at the *locus in quo*.

Counsel says: "The precise question that the appellant desires to have settled is this: 'Is a railroad company bound to fence its road where it runs through a populous portion of a town or city, where the ground is laid off into ordinary sized building lots with streets and alleys between, in order to avoid liability for stock killed, on the ground that the road was not fenced.'"

The evidence in the case consists of an agreed statement of

78 319
124 213

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facts, to the effect that the animal was killed by a locomotive or car, upon the line of the appellant's road and right of way, in the town of Marion, at a point between two parallel streets, and not upon the crossing of a street, or alley, nor in a public place. The distance from one street to the other, along the line of the railroad, which is not at right angles with the streets, is about twenty-five rods. The lots next to the right of way, which, at the place in question, is only fourteen feet wide, were enclosed by fences which extended across the alleys laid out between said streets, making a continuous line of fence on either side of the railway track from one street to the other; so that there was no access to this part of the appellant's track and right of way, except from the streets, and at these there were no cattle-guards or other means to prevent the incursion of animals upon that part of the track.

The principal reason suggested by counsel, why such portions of a railroad should not be deemed to come within the general rule of liability imposed by the law, is, that the numerous cattle-guards which would be necessary would weaken the road-bed, and thereby cause danger instead of averting it. It is a sufficient answer, that there is no evidence in the case that such would be the necessary or probable consequence of putting in the requisite guards, and it can not be judicially known that such would be the result. The statutory rule is, that railroad companies shall be liable for injuries done by their locomotives or cars to animals at places where their roads might be but are not fenced; and it is not the province of the courts to create exceptions to the rule, or to interfere with the legislative policy, upon the ground suggested, or for any like reason. See *The Indianapolis, etc., R. R. Co. v. Parker*, 29 Ind. 471; *The Toledo, etc., R. W. Co. v. Howell*, 38 Ind. 447; *The Indianapolis, etc., R. R. Co. v. Christy*, 43 Ind. 143; *The Indianapolis, etc., R. R. Co. v. Lindley*, 75 Ind. 426.

Judgment affirmed, with costs.

Dill *et al.* v. Vincent.

No. 8418.

DILL ET AL. v. VINCENT.

JUDGMENT.—*Decree of Foreclosure.*—*Collateral Attack.*—*Action to Recover Real Estate.*—*Sheriff's Sale.*—*Presumption.*—A decree of foreclosure against a woman and her husband can not be successfully attacked by her as a defendant in a collateral proceeding by the holder of the sheriff's deed to recover possession of the real estate sold and conveyed to him by virtue of the decree. The correctness of the decree, and of the sheriff's sale under it, must be presumed against her.

SAME.—*Wife's One-Third of Proceeds.*—In such case, if the wife be entitled to one-third of the proceeds arising from the sale of the mortgaged premises, she must enforce her right by separate action. It would not defeat the purchaser's right to possession.

From the Dearborn Circuit Court.

W. S. Holman, J. Schwartz and O. M. Wilson, for appellants.
O. B. Liddell, for appellee.

ELLIOTT, J.—This was an action instituted by the appellee against the appellants, to recover the possession of real estate.

The only questions presented by this appeal are those arising upon the refusal of the trial court to award a new trial, which was claimed by the appellants.

The appellee founded his claim of title upon a sheriff's deed executed to him by the sheriff of Dearborn county. In support of his claim he introduced a judgment and decree, sheriff's return to the certified copy of the decree, and the deed thereon executed by the sheriff. The principal contention of counsel for appellants is, that the appellant Barbara Dill is entitled to one-third of the property sold by the sheriff and claimed by the appellee. The decree was based upon several mortgages which had been executed by the appellant Barbara Dill and her husband, Liborious Dill. There were also embraced in the decree several judgments against the husband alone, the holders of which had been made parties as junior incumbrancers to the foreclosure proceedings. The decree con-

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tained a proviso barring the equity of redemption of both husband and wife, and directing a sale of the mortgaged premises; and it also provided for the disposition of the surplus remaining after satisfaction of the judgment.

The appellee bid in the property for \$1,500, which was the amount due upon the mortgages and judgments described in the decree.

The purchase by Vincent under the decree gave him a title to the land purchased, freed from the claims of Mrs. Dill. If the decree was erroneous in directing a sale of the land, and in divesting her of her rights therein, it can not be successfully attacked in this collateral manner. If counsel are right in their position, that the decree divesting Mrs. Dill of her rights is wrong, their remedy is by a direct attack upon the judgment and decree. The appellee's answer to the argument of appellants is, that the case is strictly analogous to cases where there are some claims waiving relief from valuation laws, and others containing no such waiver, and that, as it is proper in such cases to render judgment directing one sale, and that without relief, it was proper to render one decree in this case directing a sale of the entire tract, making proper provision for distribution of proceeds of surplus remaining after satisfaction of the decree on the mortgage. This question is not in this case. The question would be properly presented in a direct attack upon the judgment; it is not involved in this collateral proceeding.

It is argued that Mrs. Dill is entitled to one-third of the proceeds arising from the sale of the mortgaged premises. If this were granted, it would avail nothing here, for it would not defeat appellee's right to possession. If the appellant Barbara Dill has any such right, it must be enforced in the proper action against the proper parties. The decree contained a provision for the disposition of the surplus remaining after satisfaction of the judgment. If this provision was the correct one, Mrs. Dill must proceed against the persons charged with the due execution of the decree; if not correct, then her

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remedy, if any she has, would be to compel a proper correction of the erroneous decree.

It is contended that the premises were not sold in parcels. The decree of foreclosure settled this question, and appellants' argument upon this point is foundationless. If this were not so, the presumption is, that the sheriff did his duty in making the sale, and there is nothing tending to show the contrary.

Judgment affirmed.

Opinion filed at May term, 1881.

Petition for a rehearing overruled at November term, 1881.

No. 8212.

LARY v. THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILROAD COMPANY.

NEGLIGENCE.—*Railroad Company.—Damages.*—The plaintiff, without invitation, and as a mere intruder, entered upon the uninclosed premises of the defendant, upon which was a building of the defendant in a state of visible decay. While there a sudden storm blew a fragment of the dilapidated building against the plaintiff, injuring him severely. The building had once been used as a freight house, but had been long since abandoned as a place of public business, and was not so situated, with reference to any public way, as to endanger travellers thereon.

Held, in an action for damages for the injuries received, that the plaintiff could not recover.

From the Madison Circuit Court.

W. A. Kittinger, A. F. Harrison and W. R. Pierce, for appellant.

A. C. Harris, H. H. Poppleton, J. A. Harrison and R. Lake, for appellee.

MORRIS, C.—The appellant sued the appellee for damages alleged to have been sustained by him through the negligent failure of the appellee to repair a building standing on its

78	323
136	442
78	323
154	53
78	323
167	336

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ground and formerly used by it as a freight house, situate within the limits of the city of Anderson, Madison county, Indiana.

The appellee answered the complaint by a general denial. The cause was submitted to a jury for trial. The appellant having introduced his evidence to a jury, the appellee demurred to it and the appellant joined in demurrer. The court sustained the demurrer, and the appellant excepted.

The ruling of the court upon the demurrer is assigned as error.

The facts which the evidence proved, or tended to prove, are substantially as follows:

The appellee, called in the evidence the "Bee Line," on the 3d of April, 1878, owned and operated a railroad, passing through the town of Anderson, Madison county, Indiana. In the south-east part of said town it crosses the "Pan Handle" railroad, the course of the appellee's road being nearly east and west, and that of the Pan Handle from north-west to south-east. On the west side of the Pan Handle tracks, and north of the Bee Line tracks, there was a passenger depot. A freight house had been built, several years ago, about twenty feet west of the passenger depot, with a platform on the south side and west end of the same. The surface of the earth on which the freight depot stood inclined to the north; the house and platform rested on stone pillars. Next to the track, the platform and floor were some two feet above the level of the track, and on the further side, some seven or eight feet above the surface of the ground. The space between the platform and floor and the earth was open. A year or two before the alleged accident, the appellee moved its general freight business to a depot nearer the city, and the freight house in question was no longer used as the general freight house of the appellee, though still used for some purposes, such as storing the appellee's wood and lumber. A highway or avenue led from the crossing northwardly to the town, dividing the angle formed by the railroads. The appellee owned half an acre of

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ground between its track and this highway or avenue, upon which the depot stood.

Patrick Lary, the father of the appellant, lived near the Bee Line tracks, and some distance west of the crossing. At a point up the avenue from the crossing, a road leads west toward his home. A heading factory stood some distance south-east of the crossing. The appellant, then twenty years of age, was, on the 3d day of April, 1878, employed in this factory as a "joiner," and had been employed in it as a common laborer for some time before. On the 3d of April, 1878, it rained, so that the factory shut down by ten or eleven o'clock in the forenoon. The appellant, in company with several other boys, started for home, and when they reached the crossing they walked along the Bee Line tracks until they reached the old freight house. The appellant had been in the habit of passing this freight house almost daily for some time. He noticed, in July, 1877, that a part of the roof of the building was off, but had never given it further notice. As the appellant and his companions came up the Bee Line track, they were throwing mud balls at each other. It was raining, and they ran under the platform of the freight house, where they continued their sport of throwing mud balls and pitching pennies. The appellant, to avoid the mud balls thrown at him by his companions, ran behind one of the stone pillars supporting the platform on the west end of the freight house. They had been playing some ten or fifteen minutes, when a severe and sudden blast of wind struck the freight house, while the appellant was behind the pillar. It tore off a piece of the roof of the building some ten feet square. The appellant, being frightened by the noise, ran out in the open space, and looking up saw the piece of the roof blown off, in the air. He ran toward the avenue, but before or as he reached the edge of it, this fragment of the roof fell upon and crushed him to the earth. The appellant was bruised and internally injured by the accident, and had not, at the time of the trial, entirely recovered from the injury.

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Upon the facts thus stated, can the appellant maintain this action?

There is no testimony tending to show that the appellant was at the freight house by the invitation of the appellee, nor that he was there for the purpose of transacting any business with the appellee. The appellant intruded upon the premises of the appellee, and is not, therefore, entitled to that protection which one, expressly or by implication, invited into the house or place of business of another, is entitled to. The appellant was a trespasser, and as such he entered upon the appellee's premises, taking the risks of all the mere omissions of the appellee as to the condition of the grounds and buildings thus invaded without leave. We do not wish to be understood as holding or implying that if, on the part of the appellee, there had been any act done implying a willingness to inflict the injury upon the appellant, it would not be liable. But we think there is nothing in the evidence from which such an inference can be reasonably drawn. The building could be seen by all; its condition was open to the inspection of every one; it had been abandoned as a place for the transaction of public business; it was in a state of palpable and visible decay, and no one was authorized, impliedly or otherwise, to go into or under it. Under such circumstances, the law says to him who intrudes into such a place, that he must proceed at his own risk.

In the case of *The Pittsburgh, etc., R. W. Co. v. Bingham*, 29 Ohio St. 364, the question was: "Is a railroad company bound to exercise ordinary care and skill in the erection, structure, or maintenance of its station house or houses, as to persons who enter or are at the same, not on any business with the company or its agents, nor on any business connected with the operation of its road; but are there without objection by the company, and therefore by its mere sufferance or permission?" The court answered this question in the negative.

In the case of *Hounsell v. Smyth*, 7 C. B. N. s. 731, the

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plaintiff fell into a quarry, left open and unguarded on the unenclosed lands of the defendant, over which the public were permitted to travel; it was held that the owner was under no legal obligation to fence or guard the excavation unless it was so near the public road as to render travel thereon dangerous. That the person so travelling over such waste lands must take the permission with its concomitant conditions, and, it may be, perils. *Hardcastle v. The South Yorkshire R. W. Co.*, 4 H. & N. 67; *Sweeny v. Old Colony, etc., R. R. Co.*, 10 Allen, 368; *Knight v. Abert*, 6 Barr, 472.

After reviewing the above and other cases, Judge BOYNTON, in the case of *The Pittsburgh, etc., R. W. Co. v. Bingham*, *supra*, says:

“The principle underlying the cases above cited recognizes the right of the owner of real property to the exclusive use and enjoyment of the same without liability to others for injuries occasioned by its unsafe condition, where the person receiving the injury was not in or near the place of danger by lawful right; and where such owner assumed no responsibility for his safety by inviting him there, without giving him notice of the existence or imminence of the peril to be avoided.”

In the case from which we have quoted, the intestate of the plaintiff was at the defendant's station house, not on any business with it, but merely to pass away his time, when, by a severe and sudden blast of wind, a portion of the roof of the station house was blown off the building and against the intestate, with such force as to kill him. The case, in its circumstances, was not unlike the one before us. *Nicholson v. Erie R. W. Co.*, 41 N. Y. 525; *Murray v. McLean*, 57 Ill. 378; *Durham v. Musselman*, 2 Blackf. 96 (18 Am. Dec. 133).

In the case of *Sweeny v. Old Colony, etc., R. R. Co.*, 10 Allen, 368, the court say:

“A licensee, who enters on premises by permission only, without any enticement, allurement or inducement being held out to him by the owner or occupant, can not recover damages for injuries caused by obstructions or pitfalls. He goes

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there at his own risk, and enjoys the license subject to its concomitant perils." *Carleton v. Franconia Iron and Steel Co.*, 99 Mass. 216; *Harris v. Stevens*, 31 Vt. 79, 90; *Wood v. Lead-bitter*, 13 M. & W. 838.

The evidence in this case brings it, we think, within the principles settled by the above cases.

The appellant contends that the evidence shows that the appellee was guilty of gross negligence in not repairing its freight house, and that such negligence renders it liable, though he entered upon its premises without invitation or license, as a mere intruder, and was, while such intruder, injured; and, in support of this proposition, we are referred to the following cases: *Lafayette, etc., R. R. Co. v. Adams*, 26 Ind. 76; *Indianapolis, etc., R. R. Co. v. McClure*, 26 Ind. 370; *Gray v. Harris*, 107 Mass. 492; *Isabel v. Hannibal, etc., R. R. Co.*, 60 Mo. 475.

In the first of the above cases, the court held, that, where the negligence of the company was so gross as to imply a disregard of consequences or a willingness to inflict the injury, it was liable, though the party injured was not free from fault. In the second case, it was held that a railroad company, not required to fence its road, would not be liable for animals killed on its road, unless guilty of gross negligence. The phrase "gross negligence," as used in these cases, means something more than the mere omission of duty; it meant, as shown by the evidence in the cases, reckless and aggressive conduct on the part of the company's servants. "Something more than negligence, however gross, must be shown, to enable a party to recover for an injury, when he has been guilty of contributory negligence." *The Pennsylvania Co. v. Sinclair*, 62 Ind. 301. There was, in the cases referred to in 26 Ind., something more than negligence. As in the case of *The Indianapolis, etc., R. W. Co. v. McBrown*, 46 Ind. 229, where the animal was driven through a deep cut, eighty rods long, into and upon a trestle work of the company, there was aggressive malfeasance. In the Massachusetts case, the court

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held that a party building a dam across a stream must provide against unusual floods. We do not think these cases applicable to the one before us.

There could be no negligence on the part of the appellee, of which the appellant can be heard to complain, unless, at the time he received the injury, the appellee was under some obligation or duty to him to repair its freight house. "Actionable negligence exists only where the one whose act causes or occasions the injury owes to the injured person a duty, created either by contract or by operation of law, which he has failed to discharge." *Pittsburgh, etc., R. W. Co. v. Bingham, supra. Burdeck v. Cheadle*, 26 Ohio St. 393; *Town of Salem v. Goller*, 76 Ind. 291. We have shown that the appellee owed the appellant no such duty.

The judgment below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

No. 8947.

ROGERS ET AL. v. THE STATE, EX REL. COX ET AL.

PLEADING.—*Bond.*—*Exhibits.*—In a suit upon a bond, where the complaint does not aver that a copy of the bond is filed therewith, but there is annexed to it, under the heading "Copy of bond," an instrument in the form of a bond executed by the defendants, and such as is described generally in the complaint, a demurrer should be sustained.

From the Monroe Circuit Court.

J. W. Buskirk, H. C. Duncan, J. H. Loudon and R. W. Miers, for appellants.

J. F. Pittman, J. B. Mulky, R. A. Fulk, G. W. Friedley and E. D. Pearson, for appellees.

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BICKNELL, C. C.—This was originally a suit by the appellees, as widow and heirs of David Rogers, against James H. Rogers and Aquilla Rogers, on a bond given by James H. Rogers, as commissioner in a partition suit, to sell the real estate of which said David Rogers died seized, and which had descended to the appellees.

The widow, Lucinda, had become the wife of Jasper Cox.

After the commencement of this suit, James H. Rogers died; Aquilla Rogers became his administrator and was substituted for him as a defendant.

The amended complaint stated the execution of the bond, by James H. Rogers as principal and Aquilla Rogers as surety, and that James H. sold the land for \$6,000, and converted the money to his own use, and was removed by the proper court for failing to pay over the money when duly ordered thereto. The complaint avers a demand for the money from James H. Rogers, and a refusal by him to pay it, and prays for all proper relief.

It avers that a former bond, executed by the same parties, was duly approved by the court, and that a copy thereof is filed with the complaint; that this first bond was for \$13,200, and that the land was reappraised and its value fixed at \$6,000, and that thereupon said James H. Rogers "executed the bond in suit in the penal sum of \$12,000, with Aquilla W. Rogers, in the name of A. W. Rogers, as surety thereon, and under said bond sold said lands for \$6,000, and received the purchase-money therefor, which bond was filed with the clerk of said court in said cause."

It is not stated by whom this bond was filed, nor that it was approved, and it is not stated that any copy of this bond is filed with the complaint.

No copy of the first bond appears in the record, but immediately after the copy of the amended complaint, the following appears in the record:

"COPY OF BOND.

"Know all men by these presents, that we, James H. Rog-

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ers and A. W. Rogers, are bound unto the State of Indiana in the penal sum of \$12,000. Sealed this — day of December, 1869.

"Whereas said James H. Rogers has been appointed commissioner by the court of common pleas of Monroe county, Indiana, to sell certain lands belonging to Lucinda Cox, James Robinson, Mary S. Robinson, Jonathan L. Rogers and George B. McClellan Rogers, reported by commissioners not to be susceptible of partition without injury thereto to said parties: Now, if the said James H. Rogers shall faithfully discharge his duties in said trust as such commissioner and account for and pay over to the persons and parties entitled thereto the proceeds of the sale of said lands, then this obligation to be void, else to remain in force.

(Signed)

"JAMES H. ROGERS,

"A. W. ROGERS."

This copy is not marked as an exhibit; it is not stated to be a copy of the bond sued on; its heading is simply "Copy of bond," and it is not a copy of the bond sued on; the bond in suit is set out in the bill of exceptions, and the recital of that bond differs from the recital in this "Copy of bond" by including the name of America Rogers as one of the owners of the lands.

The defendants jointly filed a demurrer to the complaint for want of facts sufficient, etc., and the defendant Aquilla Rogers, for himself individually, filed a like demurrer.

The overruling of these demurrers is assigned as error.

It was held in *The Peoria, etc., Insurance Co. v. Walser*, 22 Ind. 73, that "in order that the court may know that the written instrument is filed with the pleading, as constituting the foundation of the particular action, it must be identified by reference to it, and making it an exhibit in that pleading." This language was adopted and re-asserted in *Sinker, Davis & Co. v. Fletcher*, 61 Ind. 276. See, also, *Price v. The Grand Rapids, etc., R. R. Co.*, 13 Ind. 58; *Hiatt v. Goblt*, 18 Ind. 494; *Cook v. Hopkins*, 66 Ind. 208; *Ohio, etc., R. W. Co. v. Nickless*, 71 Ind. 271; *Williams v. Osbon*, 75 Ind. 280.

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Such a defect might have been cured by amendment in the court below, but after a demurrer this court can not regard it as amended. *Utica Township v. Miller*, 62 Ind. 230; *Sinker, Davis & Co. v. Fletcher, supra*; *Johnson v. Breedlove*, 72 Ind. 368.

For the error of the court below in overruling the demurrers to the complaint, the judgment ought to be reversed. This result renders it unnecessary to consider the other errors assigned, which may not occur on an amended complaint.

PER CURIAM.—It is therefore ordered by the court, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things reversed, and this cause is remanded, with instructions to the court below to sustain the demurrers to the complaint.

 No. 9816.

JOHNS v. THE STATE.

78	332
152	660
78	332
166	567
78	332
170	190
170	629

CRIMINAL LAW.—*Public Offence Act of 1881*.—Where the act of April 14th, 1881, Acts 1881, p. 174, defines an offence described in earlier statutes, it abrogates the provisions of such statutes.

SAME.—*Desecration of Sabbath*.—*Constitutional Law*.—The 95th section of the act of April 14th, 1881, Acts 1881, p. 194, does not grant immunities to one class of citizens which, upon the same terms, shall not belong to all, and is constitutional and valid.

From the Marion Criminal Court.

H. N. Spaan and *F. Heiner*, for appellant.

D. P. Baldwin, Attorney General, *W. W. Thornton*, and *J. B. Elam*, Prosecuting Attorney, for the State.

ELLIOTT, C. J.—The first question presented is: Which of the two acts declaring it a misdemeanor to engage in common labor on Sunday is in force, that of March 5th, 1881, or that

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of April 14th, 1881? Our conclusion is that the statute in force is that of the 14th of April. It is found in a general statute grouping together public offences. It was the evident purpose of the Legislature to embody in this general statute the substance of former laws defining offences, and prescribing punishment for felonies and misdemeanors. The legislators intended to supplant all former enactments by the provisions of the act entitled "An act concerning public offences and their punishment." Where this act defines an offence described in earlier statutes, it abrogates the provisions of those statutes. The 95th section of the act of April 14th, 1881, declares the law governing prosecutions for the offence of engaging in common labor on the first day of the week, and is the law which governs this case.

The second question is this: Is the 95th section of the act of April 14th, 1881, in conflict with any constitutional provision? A long line of decisions affirms the validity of this law. It has been sustained against repeated assaults. It has been a part of the statutory law of the State since its organization. Cases old and new have sustained and enforced it. *Rogers v. Western Union Telegraph Co.*, ante, p. 169, and authorities cited; *Mueller v. The State*, 76 Ind. 310. Like statutes have been upheld in almost all of the States of the Union.

It is asserted that an objection against this statute is now urged, which has not been presented in any of the numerous cases decided by this court. This objection is, that the proviso which reads thus, "but nothing herein contained shall be construed to affect such as conscientiously observe the seventh day of the week as the Sabbath," brings the section under examination into conflict with section 23 of the Bill of Rights. This objection can not prevail. The constitutional provision referred to reads thus: "The General Assembly shall not grant to any citizen, or to any class of citizens, privileges or immunities which, upon the same terms, shall not belong equally to all citizens." The statute under immediate mention does not grant immunities to one class of citizens which,

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upon the same terms, shall not belong to all. The terms upon which the immunity may be enjoyed are granted to all, and denied to none. All citizens accepting these terms may claim the immunity. All who observe the seventh day of the week are entitled to the immunity provided. There is nothing restricting any citizen from enjoying it upon the same terms with all his fellow citizens.

The framers of the statute meant to leave it to the consciences and judgments of the citizens to choose between the first and the seventh day of the week. One or the other of these days they must refrain from common labor. Which it shall be is to be determined by their own consciences. It was not the purpose of the law-makers to compel any class of conscientious persons to abstain from labor upon two days in every week. Without the proviso which is said to break down the law, a large number of citizens would be compelled to lose two days of labor. One day, because of their conscientious convictions of religious duty, and one by the command of the municipal law. We know that there are sects of Christians who conscientiously believe the seventh day to be the divinely ordained Sabbath. We know, too, that there is a great people, who, for many centuries, and through relentless persecution and terrible trials, have clung with unswerving fidelity to the faith of their fathers that the seventh day is the true Sabbath. If the proviso were wrenched from the statute, these classes of citizens would be compelled, in obedience to their religious convictions, to rest from labor on the seventh day, and, by the law, also compelled to refrain from common labor on the first day of the week. A leading and controlling element of our system of government is, that there shall be absolute freedom in all matters of religious belief. The statute here under examination is framed in harmony with this all pervading and controlling principle. It was meant, not to secure special privilege to any class, but to afford free opportunity to all to observe that day which, in their conscien-

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tious judgments, they believe to be that upon which good men should cease from labor.

The opinion in *Fry v. The State*, 63 Ind. 552, vindicates the constitutionality of the statute we are discussing. It was there held that it is competent for the Legislature to restrict the sale of railway tickets to persons who have complied with certain prescribed terms, and to punish persons selling tickets who had not complied with the requirements of the law. As was there said by HOWK, C. J., as the organ of the court, "It is neither the province nor the duty of the courts to call in question either the policy or the wisdom of any act of legislation."

Stoutly sustaining the views here declared are these cases: *City of Cincinnati v. Rice*, 15 Ohio, 225; *City of Canton v. Nist*, 9 Ohio St. 439. The Ohio cases do, indeed, go farther, for they declare that a statute without this exception would not be valid. These cases are entitled to great consideration, not only because they are ably reasoned, but also because the constitution of Ohio is very like our own.

Judgment affirmed.

No. 8428.

SHAW ET AL. v. NEWSOM ET AL.

MORTGAGE.—*No Priority Between Different Claims.*—A single mortgage, given to secure obligations to different parties maturing at different times, is equivalent to the simultaneous giving of separate mortgages to secure such obligations, and no priority is allowed. Otherwise, if the obligations were payable to the same party and had passed into the hands of different owners.

SAME.—*Special Finding.*—*Motion to Modify Decree.*—*Practice.*—When a motion is made to modify a decree of foreclosure rendered upon facts found specially, the court, for the purposes of the motion, can not look beyond the finding and the pleadings.

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SAME.—Evidence.—Evidence admitted, but not relevant to any issue, furnishes no ground either for modifying the judgment or decree, or for a new trial.

From the Knox Circuit Court.

W. I. Baker, L. Shaw, H. Burns and J. S. Pritchett, for appellants.

J. H. Loudon, R. W. Miers, F. W. Viehe and R. G. Evans, for appellees.

WOODS, J.—Complaint by the appellants, and cross complaint by the appellees, Worley and the First National Bank of Bloomington, Indiana, to foreclose a mortgage made by Joseph E. and Sarah J. Newsom, to secure the payment of two promissory notes, one of which was made to the appellants by Joseph E. Newsom, as principal, and Andrew J. Newsom and James E. Miller, as sureties, and the other made by Joseph E. Newsom to Goss, Newsom & Co., a partnership composed of Andrew J. Newsom, James E. Miller and Joseph E. Goss, and by them endorsed to Worley and the bank.

The finding of the court is to the effect, that, on the 3d day of October, 1876, the defendant Joseph E. Newsom, as principal, and the defendants Andrew J. Newsom and James E. Miller, as sureties, executed their promissory note to the plaintiffs for the sum of \$1,900, due ninety days after date, as set forth in the plaintiffs' complaint herein, and that there is now due on said note the sum of \$1,812.49. * * * That on the first day of December, 1876, the defendant Joseph E. Newsom executed to the defendants Joseph E. Goss, Andrew J. Newsom and James E. Miller, under the firm name of Goss, Newsom & Co., his promissory note for the sum of five thousand and sixty dollars, due four months after date, and that said Goss, Newsom & Co. transferred said note by endorsement to the defendants, the First National Bank of Bloomington, Indiana, and Frank E. Worley, all as set forth in the cross complaint of said last-named defendants, and there is now due on said note the sum of \$6,806.10. * * * That

on the 29th day of December, 1876, the defendants Joseph E. Newsom and Sarah J. Newsom, his wife, to secure the payment of both of the notes above referred to, executed to the defendants Joseph E. Goss, Andrew J. Newsom and James E. Miller, under the firm name of Goss, Newsom & Co., their mortgage on the following described real estate, to wit., etc.

Upon this finding, the court ordered the equity of redemption of the mortgages in and to the mortgaged premises foreclosed, and that the proceeds of the sale, after payment of costs, be applied *pro rata* upon the respective sums found due the appellants, and the appellees, Worley and the First National Bank. The appellants moved at once for a modification of the decree, to the effect that their demand should be preferred and paid in full, before any part of the proceeds of the sale should be applied upon the sum found due to the said appellees.

The court overruled the motion, the appellants saved an exception and have assigned error on the ruling. This presents the question to be decided.

The appellants argue that their lien was prior to that of the appellee because their demand became due first.

It is the well settled law of this State, that if a mortgage be given to secure successive instalments of a debt, evidenced by promissory notes maturing at different times, and the notes pass into different hands, the transfer of the notes operates as an assignment *pro tanto* of the mortgage, and the holders of the several notes have priority of lien in the order in which their respective demands become due. *The People's Savings Bank, etc., v. Finney*, 63 Ind. 460, and cases cited; *Doss v. Ditmars*, 70 Ind. 451.

It by no means follows, however, that a like priority shall prevail when a single mortgage is given to secure separate obligations to different parties, maturing at different times. Such a mortgage is in all essential respects equivalent to the simultaneous giving of separate mortgages to secure such obliga-

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tions. *Moffitt v. Roche*, 76 Ind. 75. And in such case no priority is allowed. *Cain v. Hanna*, 63 Ind. 409; *Goodall v. Mopley*, 45 Ind. 355.

The appellants further claim, upon this point, that the evidence shows an arrangement between the members of the firm of Goss, Newsom & Co., whereby the members of the firm might endorse or sign as surety for the customers of the company, and, if loss was suffered, it should be borne by the firm; that it was under this arrangement that Andrew Newsom and Miller became sureties upon the note to the appellants, and consequently their liability upon the note was in legal effect the liability of Goss, Newsom & Co.; and in reference to these facts counsel for the appellants say: "We understand the rule in equity to be, that where a surety takes a security to indemnify himself against loss by reason of his suretyship, and also to secure a debt due to him personally, the security is first to be applied to the payment of the debt for which he is surety, and if the security is not sufficient to satisfy both debts, the surety must bear the loss." 1 Hilliard Mort. 347, section 48; Brandt Suretyship, 382, section 283.

Without controverting the soundness of the doctrine as stated, it is enough to say that it can not be applied to the record before us. It is not averred in the pleadings, nor found by the court, that the firm of Goss, Newsom & Co. are liable as sureties upon the note made to the appellants; and, in passing upon the motion of the appellants for a modification of the decree, the court was not called upon, and indeed had no right, to look beyond its finding and the pleadings in the case, and unless, upon the issues and the finding, the appellants were entitled to the alleged priority, the court committed no error in overruling their motion.

There being no issue in the case to which it was relevant, the evidence referred to afforded no ground, either for a modification of the decree, or for a new trial.

The judgment is affirmed, with costs.

Teal v. Langsdale.

No. 8254.

TEAL v. LANGSDALE.

VENDOR AND PURCHASER.—*Contract.—Rescission.—Failure of Title.—Answer.*

—*Deed.*—In an action to rescind a contract for the purchase of real estate, and to recover back the purchase-money paid, on the ground that the defendant did not convey at the time stipulated, and has no title, it is not necessary, in order to defeat the action, that the defendant with his answer should bring a deed into court for the plaintiff. It is enough to show that he is not in default.

SAME.—Pleading.—Reply.—Departure.—In such action, a reply, that since the commencement of the suit the defendant has conveyed the property to another, is a departure, and for that reason a demurrer was properly sustained to it.

SAME.—Sheriff's Deed.—Evidence of Title.—Where a party claims title through a judgment of foreclosure, a sheriff's deed is not sufficient evidence of his title.

From the Marion Superior Court.

N. B. Taylor, F. Rand and E. Taylor, for appellant.

T. A. Hendricks, A. W. Hendricks, C. Baker and O. B. Hord, for appellee.

BEST, C.—This action was brought by the appellant against the appellee, on the 4th day of April, A. D. 1878, to recover back \$500, which the former had paid the latter upon a contract to purchase certain real estate. The complaint consisted of three paragraphs. The first averred in substance, that the appellant, on the 19th day of March, 1878, purchased of the appellee "the Marion mill property, with the lands, appurtenances and hereditaments and houses thereon belonging, including residence, in Shelby county, Indiana," for the sum of \$3,200; that he paid \$500 at the time, and agreed to pay the balance of the price when the appellee should make him a good and sufficient warranty deed for the property; that the appellee agreed to make such deed on or before the 22d day of March, A. D. 1878, and was to allow the appellant the rents and profits of said property from the time the contract was made; that the contract was in writing, and a copy was

78	339
139	197
78	339
156	62

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attached ; that the appellee did not make him a deed on the 22d of March, 1878, nor at any other time ; that appellant demanded of him the \$500 on March 25th, 1878, and that they then mutually agreed to rescind the contract, and the appellee promised to pay him such sum, but that no part of it has been paid.

The second paragraph is the same as the first, except that, instead of alleging a mutual rescission of the contract, it is averred that the appellee did not have any title to any part of said property, and the same was not free from liens, but was incumbered by judgment liens to the amount of \$2,000, and the appellee could not, on the 22d day of March, 1878, make a good and sufficient deed for the same ; that he has not repaid him the \$500, nor any part of the \$4,000 damages which the appellant has sustained by reason of the breach of said contract.

The third paragraph is a common count for money had and received, accompanied by a bill of particulars, stating the \$500 so paid upon said contract of purchase.

An answer in denial was filed to the entire complaint, and a second paragraph was filed to the second paragraph of the complaint.

The second paragraph of the answer averred, in substance, that, after the execution of the contract, the appellant requested that his attorney should prepare the deed, to which the appellee consented ; that he and his wife were, at all times thereafter, ready and willing to execute the deed, but that said attorney did not prepare it until after the 22d day of March, 1878 ; that, as soon as it was prepared, he and his wife executed it, and he tendered it to the appellant, but he refused to accept it. All other allegations were denied.

A demurrer for want of facts was overruled to this paragraph of the answer.

A reply in denial was filed to each paragraph of the answer, and, at the September term, 1878, a second paragraph of reply was filed to the second paragraph of the answer.

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This paragraph averred that, since the appellant filed his former reply, to wit, on the 19th of August, 1878, the appellee had sold the property mentioned in the complaint to Henry D. Carlisle, and put him into possession; that appellee sold said property to Carlisle without the knowledge of the appellant, and Carlisle purchased and paid for said property without any knowledge of the appellant's contract; that, by said sale, appellant's contract has been rescinded, and appellee is estopped to plead the matters averred in the second paragraph of his answer.

A demurrer, because this paragraph was a departure, and because it did not state facts, was sustained, to which ruling an exception was reserved.

Trial by the court and finding for the appellee. Motion for a new trial overruled, and judgment upon the finding. Appeal to the general term, where the judgment was affirmed. This appeal questions the correctness of the judgment entered at the general term.

The errors there assigned were:

1st. The court erred in overruling appellant's demurrer to the second paragraph of appellee's answer;

2d. The court erred in sustaining appellee's demurrer to the second paragraph of appellant's reply; and,

3d. The court erred in overruling appellant's motion for a new trial.

The objections urged to the second paragraph of the answer are, that it neither alleged that the title tendered was good, nor that the tender was kept good by bringing the deed into court. Neither was necessary. This was not an action for specific performance. The appellee was not attempting to specifically enforce the contract, but appellant was seeking a rescission on the ground that the appellee did not and was not able to convey at the time stipulated. The burthen of both propositions was upon him. The first was avoided, and the other denied, by the answer. This was sufficient. Nor was

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it necessary to bring the deed into court. It was enough to show that appellant was not in default. *Melton v. Coffelt*, 59 Ind. 310, is relied upon to support appellant upon this proposition. That was an action to enforce the specific performance of a contract, and for that reason is not in point. Had the appellee attempted to collect the remaining \$2,700, the case would have been different; but, as he was merely seeking to prevent the appellant from recovering the money already paid, he was only bound to show himself not in default. The demurrer was, therefore, properly overruled.

The demurrer to the second paragraph of the reply was correctly sustained. This paragraph was a departure. The ground of the second paragraph of the complaint was, that the appellee did not and could not convey the title at the time stipulated, and for that reason the appellant elected to rescind the contract. The reply does not support this ground. It shifts the ground by alleging that the appellee, after the commencement of the suit, sold and conveyed the property to another. This made a new ground for the rescission of the contract, but it in no manner supported the ground taken in the complaint. If the appellant desired to avail himself of this fact, he could have done it by supplemental complaint, but not by a reply, and therefore this demurrer was properly sustained.

The motion for a new trial embraced fifteen different reasons. Among others, it was insisted that the finding was not supported by sufficient evidence; and upon an examination of the record, we concur with the appellant in this position. We have no brief from the appellee, and therefore do not know what view the trial court took of this question.

In support of the issue formed upon the second paragraph of the complaint, the appellant read in evidence a deed made by the appellee and his wife, on the 27th day of January, 1874, conveying the property described in the complaint to Fountain G. Robertson and Milton J. Nickum. The appellee, to

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prove that he afterward acquired the same property, read in evidence a deed made by the sheriff of Shelby county, Indiana, to him, dated the 22d, and acknowledged the 25th, of March, 1878. From the recitals in this deed, it would appear that the appellant had obtained a judgment of foreclosure against Rebusina Robertson *et al.*, and an order for the sale of the property embraced in such deed, but the decree was not offered in evidence nor its absence accounted for in any way. Some proof was offered that the order of sale could not be found in the clerk's office. Without the decree, the evidence showed the title outstanding, and this fact, with proof of the other material averments which were made, entitled the appellant to a rescission of the contract. The sheriff's deed was a link in the appellee's title, but it did not prove that he had title. This is well established in this State. *Splahn v. Gillespie*, 48 Ind. 397; *Nichol v. McCalister*, 52 Ind. 586.

The sheriff's deed to appellee and the deed tendered by appellee to appellant did not embrace four lots that appellant insists constitute a part of the mill property. If so, the appellant was entitled to a rescission. As the judgment must be reversed, this question of fact can be settled upon a subsequent trial. Several other questions are argued by the appellant, but as they may not arise upon another trial we will not pass upon them.

For the reasons given, we think the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things reversed, at the appellee's costs, with instructions to grant a new trial, and for further proceedings.

No. 8454.

COLEMAN v. COLEMAN ET AL.

78	344
133	35
78	341
149	61
78	344
156	66
156	306

PARTNERSHIP.—*Unsuccessful Attempt to Incorporate.*—An association, which does business under an unsuccessful attempt to incorporate, is a partnership, composed not only of the directors, but of the subscribers to the articles.

SAME.—*Partnership Indebtedness Purchased by Partner.*—*Payment.*—The purchase of partnership liabilities by a member of the firm, under ordinary circumstances, operates as a payment, and gives him no right against his co-partners, except to demand an accounting and contribution according to his outlay, and lawful interest.

SAME.—Under some circumstances, when it can be done without prejudice to creditors of the partnership, a member of the firm, who has purchased its obligations, may keep them alive in order to obtain the benefit of securities incident thereto, but not for an amount greater than his outlay in making the purchase, and lawful interest.

SAME.—*Pleading.*—The complaint of a partner, suing his co-partners for contribution for his outlay in buying or paying the firm debts, should state the amount of the outlay.

From the Morgan Circuit Court.

J. H. Jordan, W. M. Franklin, J. V. Mitchell and F. P. A. Phelps, for appellant.

W. R. Harrison and W. E. McCord, for appellees.

WOODS, J.—The original plaintiff in the action was James S. Coleman, but the appellant, Jesse O. Coleman, having purchased the alleged cause of action during the pendency of the suit, was substituted as plaintiff.

The complaint consisted of four paragraphs, but the gist of them all is, that the defendants and others undertook to organize a manufacturing company by the name of "The Morgantown Manufacturing Company," of which the defendants became and acted as the directors, but that, by reason of a failure to execute and file a duplicate of the articles of association in the office of the Secretary of State, there was a failure to incorporate; that the defendants, holding themselves out as directors of a duly incorporated company under the name aforesaid, entered upon and for a time conducted the proposed

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business, incurring to certain named individuals indebtedness in various sums, of which a schedule is given, and of which some were accounts and some evidenced by the promissory notes of the association, which notes and accounts, it is alleged, have been assigned for value to the plaintiff, and are due and unpaid. It is further alleged, that, by certain wrongful acts of the defendants, the company had been made insolvent.

The defendants answered by a general denial, and it was agreed that all matters of proper defence, counter-claim and reply might be proved as if specially pleaded, except that the defendants waived all objections or exceptions on account of the assignors of the claims sued on not being made defendants to answer to their interest.

At the request of the plaintiff, the court found the facts specially, and as a conclusion of law found for the defendants, to which the plaintiff excepted, and has assigned the ruling as error.

The court found the facts as stated in the synopsis which we have given of the complaint, except that the defendants were exonerated from the charge of wrongful conduct, whereby the company was made insolvent, and found further that the original plaintiff, James S. Coleman, was one of the subscribers to the articles of association, had taken an active part in promoting the scheme of incorporation, had continued to be a member of the company to the end, and, while a member, had purchased of the holders and payees thereof, some of whom were also members of the company, the notes and accounts mentioned in the complaint, paying "for the notes \$—, and for the accounts \$—," and during the pendency of the suit had sold the same to the appellant for \$1,500; that on the — day of —, the franchise of said company had been, by the judgment of the court, declared forfeited, and a receiver appointed to take charge of its assets, and that the receiver so appointed was in possession of the property and assets of the concern.

The substance of the argument made in behalf of the appellant is this:

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"The appellees were the directors of an assumed corporation that had no legal existence. * * * These directors, or agents, had no principal in existence. It was their duty to see and know that there was a principal; one that would be liable for the debts that they contracted; if not, they acted at their peril, and thus became liable as individuals."

Field on Corporations, sections 178, 179, and other authorities are cited.

The appellees, on the other hand, insist that the appellant has no better rights than his assignor, who was a member and promoter of the alleged corporation, and, therefore, estopped to deny its existence, or to question the acts of the appellees, who were agents of his own appointment; and, further, that the rights of the plaintiff's assignor were no greater than those of *his* assignors, who, having dealt with the association as a corporate body, were estopped to deny its corporate existence.

Waiving all consideration of the doctrine of estoppel contended for, and conceding that there was no corporate body, for which the appellees were authorized to act, it is still not strictly true that the appellees were agents without a principal. If the company was not a corporate body, then it was a partnership, composed not merely of the directors, but of all the subscribers to the articles of the association, who had not withdrawn, including the original plaintiff. If, therefore, the directors, by their dealings, made themselves personally liable, the original plaintiff and other members were jointly bound with them in the same liability. When, therefore, the said plaintiff bought in the outstanding notes or accounts of the firm, it was a purchase of his own indebtedness, amounting to payment, and giving him no right of action against the directors as such, but only a demand against his co-partners for an accounting and a repayment to him of their contributive shares of his outlay. What his outlay was, his complaint does not show and the finding of the court does not state, unless the

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blanks left in the finding as to the amounts paid for the claims mean that nothing at all was paid.

That the sale and transfer of an obligation of a partnership to one of the members operates as a payment, under ordinary circumstances, results necessarily from the relation of the purchaser to his co-partners, and from the fact of his being himself a principal debtor.

Under supposable circumstances, it may be that in equity the partner, who had taken assignments of the obligations of the firm to himself, would be permitted to keep them alive and enforce them against his co-partners for their contributive share of the sums which he had paid for the assignment. This might be done for the purpose of giving him the benefit of securities incident to the debts, when necessary to the doing of justice between the partners, if it could be done without injury to any creditor of the firm, but it is manifest, upon the plainest principles of equity and fair dealing, that a member of a business firm can not be permitted to make a profit for himself by purchasing the obligations of the firm at a discount, or by keeping them alive at interest; and if permitted, under any circumstances, to enforce the obligations so purchased, it can only be for the amount paid by him in taking them up, and lawful interest thereon if contribution by his co-partners shall have been unreasonably delayed.

It is not quite clear upon what theory the appellant sought to base his complaint in this instance. What sums he paid for the notes and accounts specified in his complaint, is not alleged, and no copy of any of the notes, nor itemized statement of any of the accounts, is set out and made a part of any of the paragraphs, as is required to be done when it is designed to predicate the action upon a note or an account.

But, waiving any question as to the sufficiency of the complaint, it is enough to say that, upon the facts as found, the conclusion and judgment of the circuit court were clearly right.

Judgment affirmed, with costs.

Epstein v. Greer.

No. 9450.

EPSTEIN v. GREER.

78	348
151	510

LANDLORD AND TENANT.—A tenant can not dispute his landlord's title.

SAME.—*Notice to Quit.*—*Description.*—The description of the premises in a notice to quit, as "the dwelling-house situate on the northeast corner of Fifth and Judiciary streets, Aurora, Indiana, now held of me by you as tenant," is sufficient.

SAME.—*Service of Notice.*—*Statute Construed.*—Service of the notice may be made and proved by a constable, and such notice may be served under section 6, 2 R. S. 1876, p. 341, on the tenant, whether on or off the premises, or, if he can not be found, upon some one of proper age residing on the premises.

PRACTICE.—*Answer.*—*Demurrer.*—*General Denial.*—It is not error to sustain a demurrer to a paragraph of answer, when the facts pleaded therein are admissible in evidence under the general denial filed therewith and remaining on file.

From the Dearborn Circuit Court.

J. D. Haynes and J. K. Thompson, for appellant.

W. S. Holman, W. S. Holman, Jr., H. D. McMullen and D. T. Downey, for appellee.

ELLIOTT, C. J.—The rules of law which determine this appeal against the appellant are familiar and firmly settled.

A tenant can not dispute his landlord's title. The complaint shows that the appellant was the tenant of the appellee. The answer concedes this, but avers facts showing that the landlord had no title to the demised premises. The answer is bad.

If the answer were good, no available error was committed in sustaining the demurrer. The record shows that there was an answer of general denial, and that the cause was tried upon the issue formed by this answer to the appellee's complaint. If there are any facts in the answer available to the appellant as a defence, they were admissible under the general denial, and consequently no injury resulted from the ruling upon the demurrer to the affirmative plea.

Among the points made in the discussion of the ruling upon

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the motion for a new trial is one against the sufficiency of the notice to quit. This notice is said to be defective, because the property is not described with sufficient certainty. The description is, "the dwelling-house situate on the northeast corner of Fifth and Judiciary streets, Aurora, Indiana, now held of me by you as tenant." The office of a description is to furnish means of identification, and this one certainly does do that. The appellant could not have been in doubt as to the property meant by the framer of the notice. The description can, without any difficulty, be made certain. "That which can be made certain is certain."

Another point made upon the ruling refusing a new trial is, that there is no sufficient proof of service of the notice to quit. The notice was served by a constable, who testified that he served it upon the appellant, and this the appellant affirms is not sufficient, because it does not appear that the constable was the landlord's agent. There is nothing in this proposition. Another objection is, that the notice was not served upon the appellant on the demised premises. It was not necessary that notice to quit because of non-payment of rent should have been served on the tenant while actually upon the property held under the lease. The statute in force when this contract was made provides for the service of notice to quit for non-payment of rent in these words: "Notice, as required in the preceding sections, may be served on the tenant, or, if he can not be found, by delivering the same to some person of proper age and discretion, residing on the premises." 2 R. S. 1876, p. 341. The meaning of this is, that the notice may be served on the tenant if he can be found, no matter whether he be on or off the premises; but, if he can not be found, then it may be served upon some one of proper age on the premises.

Judgment affirmed.

Grubaugh v. Jones, Adm'r.

No. 8783.

GRUBAUGH v. JONES, ADM'R.

REPLEVIN.—*Justice of the Peace.*—*Jurisdiction.*—In actions of replevin, justices of the peace have jurisdiction where the property does not exceed in value two hundred dollars.

SUPREME COURT.—*Evidence.*—*Witnesses.*—*Practice.*—*Verdict.*—Where the evidence is conflicting, and questions of fact depend upon the credibility of witnesses, the Supreme Court will not disturb the verdict.

From the Knox Circuit Court.

H. Burns, for appellant.

F. W. Viehe, *R. G. Evans*, *T. R. Cobb* and *O. H. Cobb*, for appellee.

BEST, C.—This action was brought by the appellee against the appellant, before a justice of the peace, to recover a span of mules of the alleged value of \$150, and \$50 for their detention.

The cause was tried before the justice, judgment rendered for the appellant, and an appeal taken to the circuit court.

The appellant moved the court to dismiss the action because the justice before whom it was instituted had no jurisdiction, as the amount of the property sought to be recovered exceeded the sum of \$100. This motion was overruled and an exception reserved. The cause was submitted to a jury and a verdict returned for the appellee over a motion for a new trial. Judgment was rendered upon the verdict, and the appellant appeals.

The errors assigned are, that the court erred in overruling the motion to dismiss the action and in overruling the motion for a new trial.

The appellant claims that the jurisdiction of justices of the peace is limited in actions of replevin, by section 71 of the justice's act, to cases where the value of the property sought to be recovered does not exceed the value of \$100, and in support of this position relies upon the case of *The State, ex rel. Conn, v. Forry*, 64 Ind. 260.

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Section 10 of the justice's act, as adopted in 1852, gave justices of the peace jurisdiction to try and determine suits founded on contracts or tort, where the debt or damage claimed or the value of the property sought to be recovered did not exceed \$100.

Section 71 of said act, as then adopted, provided that whenever any plaintiff shall, by verified complaint, set forth that his personal goods, not exceeding in value \$100, have been wrongfully taken, and claiming damages, not exceeding \$100 for the detention, the justice shall issue his writ. Thus the law was until 1859, when section 71 was amended so as to authorize an action for property taken by an execution or other writ, if the same was exempt from execution. This amendment, however, did not change the section as to the amount of property for which the justice was authorized to issue his writ, and in this respect the section remains as originally enacted. Section 10 remained unchanged until 1861, during all of which time it conferred jurisdiction upon justices in suits for the recovery of property not exceeding in value the sum named in section 71. The amount of the property was the same in both sections. Section 71 allowed damages in addition not exceeding \$100 to be recovered, and in this respect they differed. Section 10 was amended in 1861 so as to authorize justices to try and determine suits where the value of the property sought to be recovered did not exceed \$100, and concurrent jurisdiction to the amount of \$200. This statute is now in force. This court held, in *Leathers v. Hogan*, 17 Ind. 242, that the first clause in the statute giving jurisdiction to the extent of \$100 is surplusage, as the greater jurisdiction conferred by the second clause includes the less. The statute, thus read, confers jurisdiction upon justices in suits where the value of the property sought to be recovered does not exceed \$200. This was so held in *Harrell v. Hammond's Adm'r*, 25 Ind. 104, and *Deam v. Dawson*, 62 Ind. 22.

The appellant, however, insists that these cases were not well considered, and that the case of *The State, ex rel. Conn, v. Forry, supra*, decides the question correctly the other way.

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In the case last mentioned, the question did not arise. An action was commenced before a justice upon a complaint consisting of two paragraphs. The first was in replevin for property alleged to be of the value of \$50, and \$50 were claimed for its detention. The second was for embezzling \$106 in money, and the question arose as to whether the case was within the jurisdiction of the justice. The court held that it was not, because the value of the property, the damages claimed and the amount of money embezzled, amounted to more than \$200. The sum claimed exceeded the amount mentioned in either section 10 or section 71 of the justice's act, and for that reason it was held that the justice had no jurisdiction. This was all that was decided. True, it was said that by section 71 the jurisdiction of justices in replevin is limited, in the value of the property sought to be recovered, to the sum of \$100, and, in the amount of damages claimed, to \$100, so that in no case of replevin can the jurisdiction exceed \$200, including the value of the property and the amount of the damages claimed. This question, as before stated, did not arise, and what is said can not be regarded as a decision of the question.

Section 10 expressly confers jurisdiction in a suit where the value of the property sought to be recovered does not exceed \$200, and, unless it applies to an action of replevin, this clause of the statute is without meaning. It is the last expression of the Legislature upon the subject, and its express terms can neither be limited nor controlled by the provisions of section 71. The motion was properly overruled.

The motion for a new trial was based upon the ground that the evidence was not sufficient to sustain the verdict.

The appellant recognizes the rule, that this court will not disturb a verdict upon the mere weight of the evidence, but insists that this case forms an exception to the rule. It was shown by the evidence, that the mules in dispute belonged to the intestate some time previous to his death; that he placed them in the possession of the appellant, who was living upon

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and cropping the intestate's land upon shares, the latter furnishing a part or all of the stock. The appellant produced several witnesses, some of whom testified that the intestate had sold the property to appellant, and others to admissions made by the intestate, that he had sold the property to appellant. It is admitted that the appellee made a *prima facie* case, and whether this was successfully overcome by the appellant depended in a measure upon the credibility of his witnesses. This was a question for the jury, and one upon which we can not pass. It is unlike a suit upon a note, where the proof of payment is undisputed and entirely satisfactory. We can not say that the motion was improperly overruled, and the judgment should, therefore, be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things affirmed, at the appellant's costs.

No. 9390.

Vogel *et al.* v. Vogler.

78	353
143	221

TAXES.—*Guardian and Ward.—Complaint.—Property Omitted from Taxation.*—

In an action by a county treasurer against a guardian, to recover taxes on the money of his wards, which had not been assessed during a number of years, and on which no taxes had been paid, but which money was afterward assessed for the years it was omitted from taxation, and placed upon the tax duplicate for collection, the complaint must specifically aver by what officer and under what circumstances such special assessment was made, and the averment that the taxes sued for were assessed by "the proper authorities," is insufficient.

SAME.—*Parties.*—In such action the wards are not proper parties to the action, though the money in the hands of the guardian, if liable for taxation, ought to have been assessed in their names.

From the Monroe Circuit Court.

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N. R. Keyes, R. Hill and J. W. Nichol, for appellants.
F. T. Hord, for appellee.

NIBLACK, J.—The complaint in this case was substantially as follows :

Lewis A. Vogler, treasurer of Bartholomew county, complains of Ferdinand Vogel, Lewis Schloss and Aaron Schloss, and says that he is the treasurer of Bartholomew county, duly elected, commissioned and qualified as such, and that said Lewis Schloss and Aaron Schloss are minors under the age of twenty-one years ; that, on the 5th day of March, 1871, the said Ferdinand Vogel was duly and legally appointed guardian of said minors by the proper authorities in the common pleas court of Bartholomew county, has since continued to be such guardian, and is now guardian of said minors ; that, immediately after said appointment as guardian, to wit, on the — day of March, 1871, the sum of \$5,000 came into his hands as such guardian, belonging to said wards, and for the use of said wards, and he has held the said sum of money in his hands as such guardian in said county continually since, and now possesses the same as such guardian for his said wards ; that said money was and is the only property owned by said wards ; that the said money was the property of said wards on the 1st day of January, 1872 ; that said guardian and wards at said time, and continually since, have resided in Bartholomew county, in this State. And the plaintiff charges and avers that the said property was liable to taxation for State, county, township, etc., purposes in said county in the years 1872, 1873, 1874, 1875, 1876, 1877 and 1878 ; that the said wards, or said guardian, did not, for or during any of said years, give in said property for taxation, and the same was not taxed or assessed for taxation during said time, and no taxes were paid thereon ; that, it appearing to the satisfaction of the proper officers that the said property had not been assessed by the assessor or any one else, for taxation during said time, and no tax had been paid thereon, the proper author-

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ities, on the — day of January, 1879, did assess said property for taxation for each of said years, with just and proper taxation and assessment, with the proper and lawful amount due thereon, and the same was duly placed on the tax duplicate of said county for collection, and the same was duly placed in the hands of the treasurer of said county for collection, who received and now holds the said tax duplicate as such treasurer; that the said property was assessed for taxation in said county as aforesaid, and as follows:

NAME.	Year.	Amount.	Taxed.
Ferdinand Vogel, Guardian of L. and A. Schloss.	1878	\$5 000	\$55 00
	1877	5 000	58 85
	1876	5 000	57 60
	1875	5 000	57 00
	1874	5 000	71 50
	1873	5 000	84 00
	1872	5 000	150 00
			\$533 95

That the said sum of \$533.95 is now due and owing as and for the taxes on said money in the hands of said guardian; that the said wards have no personal property that can be seized or possessed by the treasurer for the purpose of satisfying said taxes, or any part thereof. And the said guardian fails and refuses to pay the said amount of taxes so assessed, or any part thereof, although frequent demand has been made on him therefor by the treasurer of Bartholomew county, but he now holds the said money, to wit, \$5,000, in his hands unexpended, and refuses to apply the same, or any part thereof, on said tax; that the plaintiff holds a lien on said fund for the payment of the same, and demands judgment for \$1,000, or that the said guardian be required to pay said tax out of any money in his hands, or under his control, belonging to said wards, and for all proper relief.

Vogel demurred separately to the complaint, but his de-

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murrer was overruled. A demurrer was also filed on behalf of Lewis Schloss and Aaron Schloss, the wards of Vogel, and that demurrer was also overruled.

Issue being joined, the cause was tried by the court. There was a finding for the plaintiff in the sum of \$533.95, and a judgment against Vogel for that sum, to be paid out of the money in his hands belonging to his said wards. The costs were taxed against Vogel personally.

Error is assigned, among other things, upon the decisions of the court in overruling the demurrers to the complaint.

The first objection urged to the complaint is, that the averment that the taxes sued for were assessed by the proper authorities was too general; that the averment as to the special assessment should have stated specifically the officer by whom, and the manner in which, that assessment was made.

This objection appears to us to be well taken.

The assessment of property omitted from taxation constitutes a special and an exceptional assessment, and, according to the law in force in January, 1879, might have been made either by the assessor, auditor or treasurer of the proper county, depending upon the circumstances creating an emergency for such an assessment. 1 R. S. 1876, p. 96, section 94; p. 130, section 260. A special assessment made by the assessor, if not returned to the treasurer within a limited time, is barred. 1 R. S. 1876, p. 131, section 263.

The averment, therefore, as to the officer by whom, and the circumstances under which, the special assessment was made, was a material averment, and, by reason of its failure to make such an averment, the complaint was bad upon demurrer.

While the money in the hands of Vogel, if liable to taxation, ought to have been assessed in the names of his wards, Lewis Schloss and Aaron Schloss, as the owners thereof, these wards were nevertheless not proper parties to the action, and the complaint made no cause of action as to them, aside from the objection noted to it as above. In all matters pertaining

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to the assessment and payment of taxes against them, they were represented by Vogel as their guardian.

As the judgment will have to be reversed for want of a sufficient complaint, we will not now pass upon some other very interesting questions discussed by counsel.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Petition for a rehearing overruled.

No. 9809.

DASHING v. THE STATE.

CRIMINAL LAW.—*Counterfeiting.—Jurisdiction.*—The courts of this State have jurisdiction, as prescribed by statute, to punish the offence of counterfeiting the coin of the United States current in this State.

SAME.—*U. S. Statutes Construed.—Crimes.*—Section 711 of the Revised Statutes of the United States, construed with section 5328, does not divest the States of the right and jurisdiction to enact and enforce their own criminal laws, though the acts made criminal thereby might also be made criminal by the laws of the United States.

From the Elkhart Circuit Court.

R. M. Johnson, E. G. Herr and H. C. Dodge, for appellant.

D. P. Baldwin, Attorney General, *J. S. Drake*, Prosecuting Attorney, *W. W. Thornton* and *W. L. Stone*, for the State.

WORDEN, J.—The appellant was indicted in the court below for the violation of a law of this State by fraudulently uttering and publishing as true “a piece of false, forged and counterfeit coin, resembling and apparently intended to resemble and pass for silver coin of the United States of America, called a dollar, which lawful coin was then and there current in the said State of Indiana.”

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Upon trial he was convicted, and, over a motion in arrest, judgment was rendered against him.

The only question made here is, whether a conviction can be had in such case in a State court.

It has been held in this State from an early period, that the States have the power to punish such offences. *Chess v. The State*, 1 Blackf. 198; *Snoddy v. Howard*, 51 Ind. 411. The authorities upon the question are not uniform, but we decline to enter upon a discussion of the question as an open one in this State, further than to notice some acts of Congress bearing upon the question, which will be adverted to further on in this opinion. We may observe, however, that in the case of *Fox v. The State of Ohio*, 5 How. 410, it was held by the Supreme Court of the United States, Mr. Justice McLEAN dissenting, that the power conferred upon Congress by the constitution of the United States, upon the subject, did not prevent the States from passing laws on the same subject. The theory is explained by what was said by Mr. Justice GRIER in the case of *Moore v. The People of the State of Illinois*, 14 How. 13, a case in which Mr. Justice McLEAN also dissented. It was there said: "Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both."

The 8th section of article 1 of the constitution of the United States provides that "The Congress shall have power:—

"To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

"To provide for the punishment of counterfeiting the securities and current coin of the United States."

The grant of power to Congress by the constitution, to provide for the punishment of counterfeiting the securities and current coin of the United States, does not, of itself, deprive the States of the right to make such counterfeiting a crime

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against them, and to punish it accordingly. That depends upon the action of Congress.

If Congress, though providing for the punishment of such counterfeiting as a crime against the United States, leave the several States free to make such counterfeiting a crime against them, they may do so.

This subject is well elucidated by Chancellor KENT, who says: "The Judiciary Act" (1789) "grants exclusive jurisdiction to the circuit courts of all crimes and offences cognizable under the authority of the United States, except where the laws of the United States should otherwise provide; and this accounts for the proviso in the act of 24th of February, 1807, c. 75, and in the act of 10th of April, 1816, c. 44, concerning the forgery of the notes of the Bank of the United States, declaring that nothing in that act contained should be construed to deprive the courts of the individual States of jurisdiction under the laws of the several States, over offences made punishable by that act. There is a similar proviso in the act of 21st of April, 1806, c. 49, concerning the counterfeiters of the current coin of the United States. Without these provisos, the State courts could not have exercised concurrent jurisdiction over those offences, consistently with the Judiciary Act of 1789. But these saving clauses restored the concurrent jurisdiction of the State courts, so far as, under the State's authority, it could be exercised by them. There are many other acts of Congress which permit jurisdiction over the offences therein described, to be exercised by State magistrates and courts. This was necessary; because the concurrent jurisdiction of the State courts over all offences was taken away, and that jurisdiction was vested exclusively in the national courts by the Judiciary Act, and it required another act to restore it. The State courts could exercise no jurisdiction whatever over crimes and offences against the United States, unless where, in particular cases, the laws had otherwise provided; and whenever such provision was made, the claim of exclusive jurisdiction in the particular cases was withdrawn,

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and the concurrent jurisdiction of the State courts, *eo instanti*, restored, not by way of grant from the national government, but by the removal of a disability before imposed upon the State tribunals." 1 Kent Com., 12 ed., p. 398.

It is claimed by counsel for the appellant that the provisions of the Revised Statutes of the United States, of 1878, take away jurisdiction on the subject from the State, and vest the same exclusively in the national tribunals.

Section 711 of the Revised Statutes of the United States provides that "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States:

"First. Of all crimes and offences cognizable under the authority of the United States."

This, it is claimed, vests exclusive jurisdiction in the national courts, over the subject. But this section must be taken in connection with sec. 5328, under title 70, the subject of which is expressed to be "Crimes," and in which provision is made for the punishment of such counterfeiting. Section 5328 provides that "Nothing in this Title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

It is evident by section 5328 that Congress did not intend, by anything enacted under that title, to impair or take away the right of the several States to enact and enforce such criminal laws as they might think proper; and, reading the two sections together, it seems to us to be clear that Congress did not intend, by section 711, to divest the States of the right and jurisdiction to enact and enforce their own criminal laws, though the acts made criminal thereby might also be made criminal by the laws of the United States, under the power granted to Congress by the constitution of the United States.

It follows from these views that the court below had jurisdiction.

The counsel for the appellant have cited the case of *Sherwood v. Burns*, 58 Ind. 502, but that case differs radically

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from the present. There the plaintiff was proceeding in a State court to enforce, not a State law, but an act of Congress, viz., the bankrupt act, the courts of the United States being vested with exclusive jurisdiction "of all matters and proceedings in bankruptcy." Here the State was in its own court, enforcing its own law.

The judgment below is affirmed, with costs.

 No. 7204.

BOWEN v. ROACH ET AL.

78	361
143	208

REPLEVIN.—*Landlord and Tenant.*—*Crops.*—*Sheriff's Sale.*—One who purchases land at sheriff's sale can not, after crops have been harvested by the tenant in possession at the time of the sale, and suffered to remain in actual possession, maintain replevin for the grain harvested by the tenant.

SAME.—*Evidence.*—*Deed.*—In such an action, a deed executed before the decree is admissible in evidence to show that the tenant's possession was under color and claim of right.

SAME.—*Undivided Interest in Personally.*—The owner of an undivided interest in personal property can not maintain replevin against a co-owner.

SAME.—*Possession of Crops Planted.*—A tenant of the execution debtor, having been left in undisturbed possession of the premises sold, under a claim of right, may rightfully retain possession of the crop planted, cultivated and reaped by him, yielding to the holder of the sheriff's deed the landlord's share.

PLEADING.—*Partial Answer.*—*Formal Commencement.*—*Averments.*—The formal commencement of a pleading does not absolutely control it, and if it clearly appears by direct averments, that a pleading is addressed to a part only of a complaint, it will be so treated, although in the commencement it assumes to answer the whole complaint.

From the Carroll Circuit Court.

D. Applegate, D. Turpie and H. D. Pierce, for appellant.

ELLIOTT, J.—The appellant was the plaintiff below, and sought by his complaint the recovery of a quantity of wheat.

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The appellee answered the complaint in two paragraphs, the first of which was a general denial, and the second an affirmative plea. The substantial allegations of the second paragraph are these :

The wheat was grown and harvested on land "owned, or claimed to be owned, by George O. Roach, who was then in possession thereof;" that the wheat was sowed by the appellee in the autumn of 1876, and harvested by him in the harvest of 1877; that the appellee occupied the land, sowed and cut the wheat as a tenant; that, by the terms of his lease, he, the appellee, was to sow the field in wheat and pay to the owner of the land two-fifths thereof; that appellant's title to said land was conferred by a sheriff's deed, executed in December, 1876; that the appellant had full knowledge of appellee's lease, consented thereto and permitted him to remain in possession until after the wheat was harvested. In the conclusion of the answer, appellee asserts a claim to three-fifths of the wheat and disclaims any interest in the remainder.

It is urged that the answer is insufficient, because it does not show that appellee's lessor had any title to the land or any right to execute the lease. It does show that the lease was executed by one claiming to be the owner, that the right of appellee to possession was recognized by the appellant after he had acquired his title to the land, and that this acquiescence in the right of appellee was with full knowledge of the facts. We are clear that the appellant ought, under such circumstances, to be held estopped to assert a claim which, if enforced, would sweep away the fruits of the appellee's labor. The answer makes a case where justice requires that the sower should be the reaper. If the landlord had asserted his rights before, a different question would have been presented.

The answer is said to be bad, because, in the commencement, it assumes to answer the entire complaint, and fails to make good this assumption. We are not willing to hold that the commencement absolutely controls the answer; on the contrary, we hold that if it is clearly and explicitly stated, al-

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though elsewhere than in the commencement, that the plea is addressed only to a part of the complaint, it will be good, provided it meets so much of the complaint as it is addressed to. In this case the answer in express terms asserts a claim only to a part of the property in controversy, and in terms equally explicit disclaims any interest in the remainder. We are not questioning the familiar rule, that an answer which professes to respond to an entire complaint is bad, if it does no more than answer a part; but we are holding that, under the code, the question is not controlled exclusively by the formal commencement.

The answer does state a defence to the entire complaint. It does this because it states a case in which such an action as the present will not lie. The appellee was entitled as tenant to three-fifths of the wheat; the appellant as landlord to two-fifths. Neither had a right to any specific undivided part. They were joint owners, with joint rights. Neither could maintain replevin against the other. Replevin will not lie for an undivided interest in a chattel; the plaintiff must have an exclusive interest or his action fails. The code has not changed the rule upon this subject. The provisional remedy is essentially the same in this respect as the common-law action.

The counsel, in discussing the error alleged upon the ruling denying a new trial, complain that a deed executed by James Roach to George O. Roach was improperly admitted in evidence. This complaint is groundless. The deed was properly admitted, for it tended to show that the appellee was in possession under color and claim of right. One in possession under a color of right is in a much better situation than a mere trespasser, having neither claim nor color of right. It is said that the decree of foreclosure upon which appellant's title is founded barred the rights of the grantor in the deed adduced in evidence. When the deed was executed, no decree had been entered and the grantor had good right to sell and convey. Even if the decree had been entered, his statutory right of redemption was the subject of sale and conveyance.

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The court instructed the jury as follows: "If the defendant William Roach, being then in lawful possession of the premises, planted the wheat in controversy in September, 1876, and maintained the possession of the land upon which it was grown until it was cut, your verdict should be for the defendants; but if you find from the evidence that plaintiff, Bowen, after his purchase, acquired the actual possession of the premises, then your verdict should be for the plaintiff."

Two objections are urged against this instruction. The first is thus stated in the brief:

"First. In leaving the definitions of terms to the jury, it was the duty of the court, not of the jury, to say what was meant by maintaining possession."

The position of counsel is untenable. The jury could not have misunderstood the language used by the court.

The second objection is that the title of the lessor expired December 31st, 1876, and with it that of his lessee. Had appellant asserted the right to possession, he could have evicted the appellee, but that avails nothing here. The appellant did not undertake to evict appellee, did not in any legal manner dispute his right until the wheat which the appellee had sowed had been harvested. The appellee, having been left in undisturbed possession under a claim of right as tenant of the execution debtor, might rightfully retain possession of the crop planted, cultivated and reaped by him. The appellant became entitled to the landlord's share. This right courts might have efficiently enforced, but not in such an action as the present. In order to maintain this action, the appellant must show an exclusive right to the property. It is because he fails to show such a right that his action fails. *Lacy v. Weaver*, 49 Ind. 373, is decisively against appellant.

The evidence fully supports the verdict.

Judgment affirmed.

Opinion filed at May term, 1881.

Petition for a rehearing overruled at November term, 1881.

Uhl v. Bingham et al.

No. 8194.

UHL v. BINGAMAN ET AL.

PARTNERSHIP.—Notice of Dissolution.—When a partner withdraws from a firm, direct personal notice of the fact to a customer is not necessary to relieve him from liability upon contracts made in the name of the old firm with such customer, after such withdrawal. Actual knowledge of the fact, however received, is sufficient.

SAME.—Burden of Proof.—Though, in a suit against partners, the plaintiff, being a customer, must prove the partnership to have existed, yet, having done so, if any defendant seeks to escape upon the ground that he had withdrawn from the firm before the contract was entered into, the burden is then on him to show such withdrawal, and that the fact had come to the plaintiff's knowledge.

INSTRUCTIONS.—Practice.—The error of an incorrect instruction to the jury is not cured by giving another which states the law upon the same subject correctly, unless the erroneous instruction be expressly withdrawn.

From the Cass Circuit Court.

M. Winfield, Q. A. Myers, D. C. Justice and W. D. Owen,
for appellant.

R. Magee and S. T. McConnell, for appellees.

WOODS, J.—In this case, as in the case of *Uhl v. Harvey*, ante, p. 26, the action was upon a certificate of deposit, issued by a banking firm doing business under the name of "People's Bank." The appellant, who, with the other defendants, was charged as a maker of the certificate, answered by a plea of *non est factum*, and, the jury having returned an adverse verdict, moved for a new trial, alleging, among other causes, misdirection of the jury by the court. The other defendants besides Uhl have refused to join in the appeal.

At the request of the appellee, the court gave the following instruction :

"If you find from the evidence, that the defendants, Standley, Atkinson, Whiteside, Thompson, Uhl and Strecker, were partners doing business under and by the name of the People's Bank of Logansport, Indiana, and that, while they were such partners, the plaintiff had dealings with such bank and

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was a creditor of the same, and if you further find that the plaintiff did, upon the 17th day of June, 1876, deposit with the People's Bank of Logansport the sum of \$747.65, which sum was unpaid at the commencement of this suit; *and if you further find that the plaintiff had no personal and direct notice of the dissolution of said firm by the withdrawal of any of its members*, then I charge you as the law, that the plaintiff in this action is entitled to recover from all the defendants, the amount of his deposit as set out in his complaint, with interest thereon from date, provided the plaintiff has proven the other material allegations of his complaint."

In reference to this, counsel for the appellant say :

"Passing over other objections to this instruction, that portion which requires Uhl to prove *personal* and *direct* notice to the plaintiff is clearly objectionable. Personal and direct notice is not required in any case. The law says that in the case of an old dealer there must be *actual* notice. Constructive notice is not sufficient. But actual notice may exist, and yet the party dealing with the firm may never have had any direct personal communication with either the retiring members or those who continue the business. Usually, notice is brought to the parties by indirect means.

"The instruction is radically wrong for another obvious reason. One essential element of recovery is omitted. The plaintiff must have known that Uhl was a partner, or who the partners were. The liability of a retiring partner to an old dealer for a failure to give notice is based upon the principle that the credit is given because of his connection with the firm. Having known that he was once a partner and dealt with him as such, the creditor has a right to assume that his connection with the firm continues. Of two innocent parties, he should suffer whose negligence was the cause of the injury. I cite the following from Wade on the Law of Notice, page 215 :

"It has therefore been held that, in order to render a retired partner liable to those having subsequent dealings with

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his successors in business, three facts must concur: 1. That the party seeking to hold him must have known at the time he dealt with the firm, of the former partnership. 2. That he was ignorant of the dissolution, and 3. That his dealings with the partnership were had supposing that he was contracting with the retired partner as well as his successors, and in reliance upon their joint liability. It was also held that general notoriety with respect to the existence of the partnership which had been dissolved without notice would not be sufficient to supply the place of knowledge. The transaction, to entitle the creditor to enforce his remedy against the retired partner, jointly with those continuing the business, must be, on the part of the creditor, based upon his faith in the solvency and standing of the party he seeks to hold. He could not be presumed to have acted upon such faith unless there was some antecedent knowledge of the fact upon which he is supposed to rely.' *Pratt v. Page*, 32 Vt. 13."

But for the proviso at the end of the instruction, both these grounds of objection would seem to be well taken. There were, however, in each paragraph of the complaint, averments that the plaintiff, before making the deposit in question, had dealt with the firm when all the defendants were members of it, and on the faith of their responsibility, and that he made the deposit in suit without knowledge of the withdrawal of any of them, and in the belief that they still composed the firm. These are material averments, and the proviso of the instruction required proof of them in order to establish the plaintiff's right of recovery.

The second objection to the instruction, therefore, can not be sustained.

It was error, however, to tell the jury, as was impliedly done, that the plaintiff, as a customer of the old firm, was entitled to personal and direct notice of withdrawal of any partner whom he had known as such, and that, if after such withdrawal and without such notice, he gave credit to the new

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firm (doing business under the old name), he had a right to look to the responsibility of the retired member.

The meaning of the phrase, "personal and direct notice," as used, would seem to be, not actual notice merely, but a personal notice, delivered or sent by the appellant directly to the plaintiff. Such, we think, was probably the jury's understanding of it. There is, we believe, no authority for requiring such notice. It is only necessary that the former dealer with the firm shall receive actual notice or knowledge of the retirement, but it is not necessary that the notice be communicated directly by or from the member who has retired. It may be inferred from newspaper publications, general notoriety, or such other competent evidence, as shall be sufficient to convince the jury that the party actually received the information.

We can not say, upon the entire record, that the error is merely technical, and did not affect the result of the case. The record shows that two or more witnesses testified to interviews with the plaintiff, in which, in answer to his inquiries, they had told him that Uhl had retired from, or was not connected with, the People's Bank; and there was also other evidence of indirect notice. The plaintiff, in his testimony, denied the statements of these witnesses; but it is impossible for us to determine whether the jury found the verdict for the plaintiff on the strength of his denials, or upon the ground that the testimony of the other witness, though true, did not show direct notice. It is true that other instructions were given, in which the requisite notice was spoken of as actual notice or knowledge, and there was an instruction to the effect that public notoriety was a circumstance tending to prove the notice. But the erroneous statement contained in the instruction under consideration was not expressly withdrawn, and it has been often held that the error of a bad instruction is not cured by a good one.

The court instructed the jury generally that the plaintiff had the burden of proof that the appellant was a partner with

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his co-defendants, or some of them, and liable upon the certificate, and also gave a special instruction, to the effect that notice to the plaintiff, after he had become a customer of the bank, of the subsequent retirement of any of the partners, would not be presumed, but must be proved by the defendant by a fair preponderance of the evidence.

It is claimed that this charge is wrong in itself, and inconsistent with the general charge that the burden was on the plaintiff to show the liability of the defendants. We do not think so. There can be no doubt that the general burden of the issue was, as the court instructed, on the plaintiff; but, in order to show his right of recovery against the appellant, it was only necessary to show that the appellant had been a member of the firm; that, knowing the appellant's connection, he had dealt with the bank; that the business had been carried on without change in the name of the firm, and was being so conducted at the time he made the deposit which the action was brought to recover. He was not bound to offer evidence of the negative fact, that he had not received notice of the appellant's withdrawal. Before the enactment of the law making parties witnesses, it would apparently have been impossible, under ordinary circumstances, for him to have made such proof, and the change in the law, as to the competency of parties to testify, does not affect the question. The suit might be by or against the administrator of either party, or the plaintiff might, though alive, be incapacitated by sickness, or otherwise, to testify. Besides, as we have seen, the proof of notice may consist in circumstantial evidence, common rumor, publication in newspapers, and the like; and, if the plaintiff has the initiative of the proof on the subject, then he must, besides showing that he had not received express or direct notice, go further and show that the circumstances attending the withdrawal, and subsequent occurrences, were not such as to warrant an inference of his having been informed of the dissolution or retirement. The law imposes on the re-

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tiring partner the duty of communicating notice of the fact to former customers. He therefore necessarily has, or ought to have, the means of showing that he did what he was bound to do in order to escape continued liability; and when the question of his liability, in a particular case, is narrowed down to the single inquiry, whether the requisite notice was given, the burden of the proof ought plainly to be upon him who was required to give the notice.

Other questions have been discussed by counsel, but, so far as they are important, they are covered by what has already been said in this case and in the case of *Uhl v. Harvey*, *supra*.

Judgment reversed, with costs, and with instructions to grant to the appellant a new trial.

No. 8315.

HALL ET AL. v. BISHOP.

EVIDENCE.—Record.—Copy.—A record of another State, not judicial, may be proved by a sworn copy.

SAME.—Tax List.—Fraudulent Conveyance.—The original sworn list of property made for taxation is admissible against the party making it, and a certified copy is not necessary. Such list is not irrelevant in a suit brought against him to set aside a conveyance on the ground that it was made to defraud his creditors, if it tends to show that he did not receive for the conveyance the consideration claimed.

SAME.—Officer.—Deputy.—The official character of a person may be proved by parol. So also that he was the deputy of an officer.

From the Franklin Circuit Court.

W. H. Bracken and *T. H. Smith*, for appellants.

H. Berry, Jr., *F. Berry*, *J. F. McKee* and *D. W. McKee*, for appellee.

ELLIOTT, C. J.—Suit to set aside a conveyance of real estate upon the ground that it was made for the purpose of de-

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frauding creditors. Appellee was the plaintiff below, and judgment was rendered in his favor. The only questions properly presented are those arising upon the error alleged upon the ruling denying a new trial.

Appellants moved the court to suppress parts of a deposition of a witness. This motion was overruled, and of this ruling complaint is here made. The defendants below and appellants here were charged with having fraudulently colluded together to defraud the creditors of one of them, John Hall. The evidence objected to was as to a tax list made out and verified by John Hall, in the State of Ohio. It is said that this list was not admissible for any purpose. We think otherwise. It was the sworn statement of one of the parties to the alleged fraudulent conspiracy, and contained matters relevant to the issues. It showed the property owned by the party, and tended to show whether he had or had not received the consideration which it was claimed was paid him by the persons to whom he conveyed the real estate. *Sherman v. Hogland*, 73 Ind. 472.

It is insisted that the copy of the tax list appended to the deposition was incompetent. The argument is, that either the original list or a certified copy should have been produced. The document was under the control of a witness not within the jurisdiction of the court, and a sworn copy was, therefore, not incompetent. *Thom v. Wilson's Ex'r*, 27 Ind. 370. The provision in the statute of the United States, that certified copies of records may be introduced in evidence, does not preclude the party from proving the instrument by a sworn copy. The statute does not abridge the common law right to prove by an examined and sworn copy, but adds a more convenient and less expensive method of proof. *Wharton Ev.*, section 98.

Counsel for appellants are in error in placing a tax list upon the same footing as a judicial record. It is not such a record, nor does it in any particular resemble the record of a court. It may be regarded in some respects as a public document,

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but not as a judicial record. Its force in such a case as the present is not, however, due to its character as a public document, but to the fact that it is the sworn declaration of a party in interest. We are not called upon to decide anything as to whether a judicial record can or can not be proved in any other manner than by the attestation prescribed in the act of Congress.

The court permitted Nicholas V. Johnson to testify that he was deputy auditor of Franklin county, and this, appellants say, was error because his official character should have been proved by the record. The appellants are wrong. It was not necessary to produce the record of Johnson's appointment. An objection of the same general nature is urged against the action of the court in permitting an assessor to state his official position, and is equally without force.

Original assessment lists, made out and sworn to by two of the appellants, were introduced in evidence, and this is asserted to have been erroneous, because certified copies are the only competent evidence. There is nothing in this argument. Either the originals or certified copies are admissible. *Iles v. Watson*, 76 Ind. 359.

The grantor's admissions made prior to the execution of the conveyance were properly admitted. He was, according to the theory of the complaint, and as the evidence tended to show, acting in concert with his grantees, and his declarations were admissible against them. At all events, the declarations were admissible against the party by whom they were made, and it would have been error to exclude them. We must presume, in the absence of anything to the contrary, that the evidence was properly considered and applied.

We can not disturb the finding upon the evidence, for, although not of a very satisfactory character, there is evidence supporting the finding.

Judgment affirmed.

Pittsburgh, Cincinnati and St. Louis Railway Company v. Yundt *et ux.*

No. 7819.

PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY v. YUNDT ET UX.

78	873
131	433
78	373
171	594

NEGLIGENCE.—Evidence.—Railroad.—In a suit against a railroad company, for personal injury to a passer-by, by moving cars frightening the plaintiff's team, at a street crossing of a railroad where there is much travel upon the street, evidence for the plaintiff, showing that the company had, to the plaintiff's knowledge, kept a watchman at the crossing to give signals of danger, until a short time before the accident, when, without the plaintiff's knowledge, it withdrew him, and that, as the plaintiff approached the crossing, he was careful to look for such signals and saw none, is admissible, for the purpose (with other circumstances) not only of showing negligence by the defendant, but also of showing the plaintiff was free from contributory negligence.

From the Marion Superior Court.

T. A. Hendricks, C. Baker, O. B. Hord and A. W. Hendricks, for appellant.

R. Hill and J. W. Nichol, for appellees.

WORDEN, J.—Action by the appellees against the appellant to recover damages for an injury suffered by the female plaintiff, in consequence of the alleged carelessness and negligence of the defendant in running its train of cars across a public street of the city of Indianapolis, along which street the plaintiffs were passing with a horse and buggy, whereby the horse became frightened and ran away, doing the injury.

Trial by jury; verdict and judgment for the defendant. On appeal to general term the judgment was reversed, and from the judgment of reversal the defendant appeals to this court.

On the trial there was evidence tending to show that Noble street, running north and south, is a much travelled street, and is crossed by the defendant's railroad in a populous part of the city; that the defendant had erected a building just north of its south or main track and just east of the east line of the street, which obstructed the view of trains approaching from the east from persons on Noble street north of the line

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of the defendant's tracks ; that as the plaintiffs were driving south on Noble street toward the railroad, and as they got to a point about opposite to the center of the building mentioned, a train backed suddenly along from the east, at which the horse took fright and ran away and did the injury.

A bill of exceptions shows that, at the proper time, Mrs. Yundt being examined as a witness, was asked by her counsel to state as follows :

"State whether just prior to or at the time of the accident about which you have testified, you observed any person at or near the crossing of the defendant's road on Noble street, engaged in giving signals of an approaching train on the defendant's track, and, if so, state who he was, where he was standing, and what signals, if any, he gave.

"To this question the defendant objected upon the grounds that it was immaterial, irrelevant and incompetent ; and thereupon counsel for the plaintiffs stated to the court that they proposed to prove by said witness and such other witnesses as they intended to call, that several years prior to the accident complained of the defendant had caused to be erected at the crossing where the accident occurred, a signal house, which had been continued and maintained up to the time the accident occurred, and that it had at such time placed at said crossing a watchman or flagman, whose duty it was to give notice by appropriate signals to persons desiring to cross said track at said place, of the approach of trains on said track, and that it had kept and maintained said person at said place from the time aforesaid down to within a few days of the said accident, and that he was then withdrawn without any notice to the public ; and that the plaintiffs had been accustomed for several months prior to said accident to cross said track on said street, and had observed the presence and signals of said flagman, and at the time of said accident had no personal knowledge that the said flagman had been withdrawn ; and that, just before attempting to cross said track at the time of said accident, she and her co-plaintiff looked for said flagman,

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and the signals which he had been in the habit of giving of approaching trains, and did not see a watchman or flagman, or any signal whatever of the approach of any train. Which objection was by the court sustained and the evidence excluded, to which ruling of the court the plaintiffs at the time excepted."

We are of opinion that the court erred in rejecting the evidence thus offered.

The danger of injury may be much greater where a railroad crosses a street in a city or populous town, than where it crosses a highway in the open country, or other circumstances may make such crossing in one place more dangerous than in another; and it may be laid down as settled law, that the greater the danger the more care is required by ordinary prudence, on the part of the passer-by and the railroad company, the one to avoid and the other to prevent injury. *Bellefontaine R. W. Co. v. Hunter*, 33 Ind. 335; *Indianapolis, etc., R. R. Co. v. Hamilton*, 44 Ind. 76; *Pennsylvania Co. v. Krick*, 47 Ind. 368; *Dyer v. Erie R. W. Co.*, 71 N. Y. 228; *Pennsylvania R. R. Co. v. Barnett*, 59 Pa. St. 259; *Norton v. Eastern R. R. Co.*, 113 Mass. 366; *Continental Improvement Co. v. Stead*, 95 U. S. 161.

There may have been no law or ordinance which required the defendant to keep a flagman at the crossing to warn passers-by of approaching trains, but it does not therefore follow that the absence of such flagman, or signals, was not a proper circumstance to be considered by the jury, in connection with all the other circumstances of the case, in determining the question of the defendant's negligence. See the case above cited from 44 Ind. 76, and the case from 113 Mass. 366.

In the case of *McGrath v. The New York Central, etc., R. R. Co.*, 63 N. Y. 522, evidence like that offered in this case was held to be competent on the question of the defendant's negligence. The court, however, does not appear to have been unanimous in opinion upon the point. But the decision was subsequently followed by an undivided court, in the case of

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Casey v. The New York Central, etc., R. R. Co., 78 N. Y. 518. There the court said: "So also the question as to the habit of the company in keeping a flagman at the place in question was competent, in reference to the degree of care which the company had exercised. The evidence was admissible within the rule laid down in several reported cases." Citing some cases, among which is that in 63 N. Y. 522. See also Wharton Neg., section 798, and authorities there cited.

It is clear enough, as we think, that the evidence offered was competent to be considered on the subject of the imputed negligence of the defendant. But it was intimated in the case above cited from 63 N. Y., on the authority of a previous ruling in the same case (59 N. Y. 468), that the evidence was not competent to be considered on the subject of the plaintiff's negligence.

We, however, are not satisfied with that view of the question. If the defendant had, for a considerable time before the accident, kept a flagman at the crossing to give signals on the approach of trains, and if the plaintiffs had been in the habit of crossing the railroad at that place and observing the signals, and if, on the occasion of the accident, no signal was given, the plaintiffs not knowing that the services of the flagman had been dispensed with, these facts might, in our opinion, be considered by the jury, in connection with all the other circumstances, in determining whether or not the plaintiffs were free from contributory negligence.

The absence of any signal of an approaching train on the occasion did not dispense with the necessity, on the part of the plaintiffs, of using their natural senses and faculties in order to avoid danger, nor relieve them from the exercise of care and prudence commensurate with the danger; but the facts offered to be proved might well be considered, in connection with the other evidence in the case, in determining whether they did exercise such care and prudence.

Suppose, instead of a flagman stationed at the crossing, the

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defendant had had gates placed across the street, kept open when the way was clear and shut when trains were passing or about to pass, and the plaintiffs had come along, and, finding the gates open, had driven through, and met with the injury complained of, is it not clear that the facts would have been competent to be considered in determining whether or not the plaintiffs were guilty of contributory negligence?

The case supposed does not differ in principle from the one here. See the case of *The North Eastern R. W. Co. v. Wanless*, 9 Eng. Rep. (Moak) 1.

Wharton says: "The better opinion is, that it is a duty for the road to place a flagman at all crossings where there is a flow of travellers and a frequent passage of trains." Wharton Neg., section 798.

However this may be, the evidence offered would tend, with all the other circumstances shown, to throw some light on the subject of the plaintiffs' contributory negligence as well as that of the defendant's negligence. This view is supported by the general course of reasoning and the authorities cited in the case of *Sweeny v. Old Colony, etc., R. R. Co.*, 10 Allen, 368. See also, as having some bearing upon the question, *Bonnell v. The Delaware, etc., R. R. Co.*, 39 N. J. L. 189; S. C., 1 Thompson Neg. 404.

As the exclusion of the evidence offered was a sufficient ground for the reversal of the judgment rendered at special term, it is unnecessary to enquire whether there was any other ground for reversal.

The judgment of reversal at general term is affirmed, with costs, and the cause remanded.

Gerard *et al.* v. Jones, Adm'r.

No. 7720.

GERARD ET AL. v. JONES, ADM'R.

PLEADING.—*Action by Administrator for Unlawful Conversion.—Complaint.—Decedents' Estates.*—A complaint by an administrator, which shows that the intestate died the owner of certain sums of money and property, which, since the death of the owner, the defendants had wrongfully converted to their own use, is good, whether the conversion occurred before or after the granting of letters of administration.

SAME.—*Practice.—Motion to Make More Specific.*—A complaint by an administrator for the conversion of certain moneys alleged to have been "received by the decedent, or by the defendants for his use," from certain specified sources, is not, on account of the alternative averment, subject to a motion to be made more specific, that averment being immaterial. ELLIOTT, J., dissents.

SAME.—*Statute of Limitations.—Demurrer.*—A plea of the six years limitation, which alleges that the cause of action accrued after the happening of a death, and that that death occurred within six years before the commencement of the suit, is self-contradictory and demurrable.

SAME.—*Unlawful Conversion.—Denial.—Confession and Avoidance.—Practice.*—When the general denial has been pleaded, it is not error to strike out pleas of special matter which may be proven under the denial; and anything which tends to show that an alleged unlawful conversion was lawful or justifiable, is provable under that issue.

SAME.—*Practice.—Withdrawal of Pleading after Swearing Jury.*—A reply, filed to an answer to which a demurrer had been sustained, may be withdrawn by leave of court after the swearing of the jury, and a re-swearing of the jury will not be necessary.

SAME.—*Replication.*—A reply which purports to, but does not, respond to the entire answer to which it is addressed, is not good.

From the Ohio Circuit Court.

A. C. Downey, H. S. Downey and W. S. Holman, for appellants.

J. B. Coles and J. Schwartz, for appellee.

WOODS, J.—Suit by the appellee against the appellants for the tortious conversion of property. Trial by jury; verdict and judgment for the plaintiff for \$5,000. The errors assigned are: *First*, that the complaint does not state facts sufficient, etc.; *second*, the overruling of the motion to have the complaint made more specific; *third*, the sustaining of a demurrer

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to the second paragraph of answer as amended; *fourth*, the striking out of parts of the third paragraph of answer; *fifth*, the overruling of the demurrers to the several paragraphs of reply; *sixth*, the permission given the plaintiff to withdraw the reply to the second paragraph of answer; and, *seventh*, the overruling of the motion for a new trial.

The material averments of the complaint are: "That William Gerard, Sr., departed this life intestate, on the — day of May, 1874, the owner of a large amount of personal property, viz., of the value of \$15,000, consisting of money received by the decedent, or by the defendants for his use,

For lands sold and conveyed to John W. Cofield, and
 interest on same, \$8,000 00
 Cash received by decedent, or by defendants for his
 use, for produce on the 'Home Farm,' in 1864, 2,500 00
 Cash legacy from estate of Reece A. Gerard, re-
 ceived by defendants for use of decedent, . . . 1,000 00
 Cash received by the decedent, or by the defend-
 ants for his use, for cattle, horses, mules, sheep,
 hogs sold, 1,000 00"

(and here follows a list of household and kitchen furniture, farming utensils and other property with values attached, to the total amount, including the foregoing items, of \$16,615), "all of which property the defendants have taken and unlawfully appropriated and converted the same to their own use and benefit, and refuse to deliver the same to this plaintiff, though often requested so to do, but have wrongfully converted all of the same to their own use, since the death of the decedent, as executors of their own wrong, to the damage of the plaintiff in the sum of \$20,000. Wherefore," etc.

It is insisted, that, in order to render one an executor *de son tort*, the act complained of "must be not only unlawful and an act of ownership, but it must be done before probate or administration granted, for otherwise the act would be a trespass or other injury to the rightful executor." This argument, and the authorities cited in support of it, may show that it

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was a mistake of the pleader to describe the defendants "as executors of their own wrong," but it does not follow that a good cause of action against them is not well stated.

The substance of the complaint is, that the intestate died the owner of certain moneys and property which, since the death of the intestate, the defendants had wrongfully converted to their own use. This makes a good complaint, whether the conversion occurred before or after the granting of letters. It would be good on demurrer, and is certainly sufficient after verdict when there has been no demurrer.

The motion to have the complaint made more specific was directed to the alternative statements concerning the items of money charged to have been received by "the decedent, or by defendants for his use," but it is evident, from what has already been said, that these expressions are quite immaterial, and, if omitted entirely, the complaint would not be impaired. Their presence produces no uncertainty in reference to the gist of the averment, which is that the decedent died the owner of the several sums named, derived from the particular sources stated. The appellants were definitely informed of what moneys they were charged with, and can not complain that the complaint is uncertain in a collateral and unimportant matter, about which, it is evident, they must have had better knowledge than the pleader. See *The Trayser Piano Co. v. Kirschner*, 73 Ind. 183. The complaint means that Gerard, Sr., died possessed of the moneys named, either in his own possession, or held by the defendants for him. If the alleged conversion occurred before the ancestor's death, then the complaint, in this material respect, is not true, and the action fails.

In respect to the dates when, and the persons from whom, the moneys received by the defendants came, the court ought perhaps to have ordered the complaint made more specific.

The amended second paragraph of answer, to which the demurrer was sustained, was to the following effect: That the said William Gerard, Sr., departed this life intestate, on the 6th day of May, 1874, and that the cause of action in the com-

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plaint set forth, the alleged conversion of property and of each item thereof, did not accrue within six years next before the commencement of the action, and that more than eighteen months elapsed after the death of the said William Gerard, before this action was commenced. This plea was filed in April, 1878, and is manifestly self-contradictory. The complaint was filed in January, 1878, and is predicated on acts alleged to have been done since the intestate's death; and, alleging that this death occurred in 1874, the plea undertakes, at the same time, to say that the cause of action, which accrued after the death, did not accrue within six years. It shows that it must have accrued within four years, and yet alleges that it did not accrue within six years. There was no error in sustaining the demurrer to this plea.

The matters stricken out of the third paragraph of the answer, as well indeed as what remains of that plea, were provable under the general denial, if competent under any form of averment, and the action of the court in that respect was, therefore, harmless. From the nature of the complaint, which charges the appellants with the wrongful conversion of property, there can not well be a confession and avoidance, and any evidence which would tend to justify their appropriation of the money or property to their own uses must be admissible under the general issue.

After the court had sustained a demurrer to the amended second paragraph of answer, the plaintiff filed a reply of several paragraphs, the first of which was addressed to the second paragraph of answer. After the jury had been impanelled, the court permitted the plaintiff to withdraw this paragraph of the reply, and proceeded with the trial without re-swearing the jury. The appellant complains of this. But there was no error in it. The jury had been sworn to try the issues, and, though one of the issues was afterward withdrawn, the oath nevertheless continued applicable to the issues that remained.

It is claimed that the court erred in overruling the demur-

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1 rers for want of facts to the second, fifth, sixth, seventh, eighth, ninth and tenth paragraphs of reply, and each of them. These replies are addressed to the third paragraph of answer, wherein it is alleged, among other things, that William Gerard, Sr., during his lifetime, assigned, transferred and delivered all his personal estate of every nature to the defendants, and that Benjamin F., Reece A. and Jerome B. Gerard, who, besides the defendants, are the only children and heirs-at-law of said William Gerard, Sr., before the death of said William, had executed certain releases to the defendants, copies of which are made part of the plea.

 The second paragraph, which purports to be a complete reply to this answer, is to the effect that the releases were executed without any consideration. The point is made, and must be sustained, that this reply is defective because it does not respond to the entire answer to which it is addressed. The averment that the intestate, in his lifetime, had assigned, transferred and delivered to the defendants all his personal estate, itself constitutes a complete defence, which the reply fails entirely to meet.

 The same objection is made to some of the other paragraphs, and perhaps truly, but as the judgment must be reversed for the error already indicated, and as the pleadings will doubtless be amended before another trial is had, we deem it unnecessary to proceed further.

 The judgment is reversed, with costs, and the cause remanded with instructions to sustain the demurrer to the second paragraph of the reply, and to grant leave to each party to amend.

DISSENTING OPINION.

ELLIOTT, C. J.—I concur in the conclusion stated in the opinion of the majority, but think the judgment should have been reversed upon the ruling denying appellants' motion to make the complaint more specific. The specific charges against the appellants are thus stated: "The defendants have converted personal property of the intestate to the value of

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\$15,000, consisting of money received by the decedent, or by the defendants for his use, for lands conveyed to John W. Cofield, and interest on same, \$8,000; cash received by decedent, or by defendants for his use, for produce on Home Farm in 1864, \$2,500; cash legacy from estate of Reece A. Gerard, received by defendants for use of decedent, \$1,000; cash received by decedent, or by the defendants for his use, for cattle, horses, mules, sheep and hogs sold, \$1,000." I think that appellants were entitled to have the court compel the appellee to state who received the money, the decedent or themselves. It is a vice in pleading to state material matters in the alternative. Facts must be positively alleged. It was the right of appellants to know when and from whom the cash charged against them was received. It was their right to demand that the appellee should state who received the money alleged to have been received for the sale of farm produce, and for what articles, and on what dates received. It was, as it seems to me, impossible to fairly try the case upon a complaint so vague and uncertain. The record shows that the case was not properly tried. Much confusion and much error is directly traceable to the defective complaint. No court can properly determine what evidence is competent under the pleading here receiving attention.

Our code means that a bill of particulars shall afford certain and definite information. Whether the particulars of the claim of a plaintiff be stated in the body of the complaint or in an exhibit is immaterial; in either case the defendant has a right to have it state definitely and certainly the particulars of the claim. *Starkweather v. Kittle*, 17 Wend. 20; *Harding v. Griffin*, 7 Blackf. 462. The case of *Goodwin v. Walls*, 52 Ind. 268, fully sustains the position here taken. As well have no specific statement at all as one which does not exhibit, with reasonable certainty, the particulars of the plaintiff's claim.

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No. 8396.

WILSON *vs.* PEELLE, ADM'R.

78	384
134	131
134	573
78	384
154	172

COVENANT OF WARRANTY.—*Seizin.—Breach.—Decedents' Estates.—Parties.*

—*Heir.*—Where a covenant of warranty was broken in the lifetime of the covenantee, and possession was by him surrendered to the holder of the paramount title, and the covenantee has died, the action should be brought by the administrator and not by the heir.

SAME.—*Paramount Title.—Complaint.*—In such action the complaint must show that the title to which possession was surrendered was paramount to that of the grantor of plaintiff's intestate and of all other persons.

SAME.—*Fee Simple.*—In such complaint an averment that the paramount title was in fee simple imports that it was the highest and most ample of all estates.

SAME.—*Eviction.—Partition.—Evidence.*—On trial of such action, a judgment in a partition proceeding, where the question of title was in issue, is competent evidence to prove the eviction of the covenantee, but not to prove the paramount title by which he was evicted.

SAME.—*Judgment.*—A judgment binds only parties and privies.

SAME.—*Real Estate.—Possession.—Deed.—Joint Tenant.*—A deed of land draws possession to the grantee, and the possession of one joint tenant is the possession of both. The title of neither is superior.

SAME.—*Sheriff's Sale.*—Where a deed was made to C. and H., and the interest of C. was sold and conveyed by the sheriff, the purchaser did not thereby acquire a title superior to that of H., nor could C.'s title by lapse of time have become superior to that of his co-owner.

SAME.—*Common Source of Titles.*—Where both parties claim under the same third person, it is *prima facie* sufficient to prove the derivation of title from him without proving his title.

SAME.—*Measure of Damages.—Set-Off.—Mesne Profits.*—In actions for breach of the covenant of seizin, the measure of damages is the purchase-money with interest, without the right to set off the mesne profits.

From the Shelby Circuit Court.

E. P. Ferris, W. W. Spencer and J. S. Ferris, for appellant.
T. B. Adams and L. T. Michener, for appellee.

ELLIOTT, C. J.—The complaint of the appellee is based upon a deed containing the usual covenants of warranty. The breach alleged is, that, at the time the deed was executed, the grantor did not have title to, or right to convey, a part of the land therein described; that a judgment was duly entered in

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an action instituted by the claimants thereof, adjudging them to be the owners, and that the appellee's intestate thereupon surrendered possession of the land awarded by the judgment to the claimants.

It is urged that the administrator has no right to maintain this action, and we are referred to the cases of *Martin v. Baker*, 5 Blackf. 232, *Burnham v. Lasselle*, 35 Ind. 425, *Coleman v. Lyman*, 42 Ind. 289, and *Frink v. Bellis*, 33 Ind. 135. These cases do not support appellant's position. The breach for which the appellee sues occurred in the lifetime of the grantee, and possession was surrendered prior to his death. Where the covenant is broken in the lifetime of the covenantee, and possession is by him surrendered to the holder of the paramount title, the action should be brought by the administrator, and not by the heir. In such a case, the land does not descend to or vest in the heir, and, therefore, no right of action for a breach of the covenant is ever acquired by him. *Craig v. Donovan*, 63 Ind. 513; *McClure v. McClure*, 65 Ind. 482.

In an action for a breach of the covenant of warranty, it is necessary for the complaint to show that the title to which possession was surrendered was a paramount one. It is not sufficient to show that it was above or greater than that of the grantor, but it must also be shown that it was superior to that of all others. The complaint in this case does show that the title which prevailed against appellee's intestate was paramount to that of his grantor and all other persons. The allegation is that Joseph Hamilton was the owner in fee simple, by an older and a better title than that of the appellant. The title of Hamilton is averred to have been in fee simple, and this imports the highest and most ample of all estates.

The other questions which appellant's counsel discuss arise upon the ruling denying the motion for a new trial. The record of a partition suit, instituted in Howard county by the owners of the paramount title, was introduced in evidence,

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and of the ruling permitting its introduction complaint is made upon the ground that the appellant was not a party to the suit, and not bound by the judgment. The record was properly admitted, not for the purpose of establishing a paramount title as against the appellant, but for the purpose of showing an eviction. A judgment rendered in an action where the question of title is in issue is always competent evidence in a case like this, for it tends to prove that the covenant was evicted from the land conveyed to him. *Rhode v. Green*, 26 Ind. 83.

The appellant contends that the finding of the court is not sustained by the evidence, and, in the course of his argument upon this point, affirms that the judgment in the partition suit is not evidence of a paramount title. In this position, counsel are right. The judgment in the partition proceedings was not effective against the appellant, for the reason that he was not a party to the suit. It is a familiar rule, that a judgment binds only parties and privies, and this elementary rule applies here. *Crance v. Collenbaugh*, 47 Ind. 256. If there was no other evidence of a paramount title than that furnished by the judgment in the suit for partition, the appellant would be entitled to a reversal. There was other evidence, for the deeds executed by all the former owners of the land were introduced by the appellee. The question does not, therefore, depend upon the effect of the judgment in the partition proceedings.

The appellee put in evidence a patent from the United States to Ezra Davis, dated January 1st, 1850, a deed from Ezra Davis to Simon P. Davis, dated October 6th, 1852, and a deed from Pleasant Davis to Michael Carr and Joseph Hamilton, dated January 26th, 1856. The title of appellant was shown to have been derived from a sheriff's sale made upon a judgment rendered in favor of Pleasant Davis against Michael Carr for the unpaid purchase-money of the real estate described in the deed from Davis to the judgment debtor and Joseph Hamilton. It is plain that appellant obtained what-

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ever title Carr had, but it is equally clear that he did not obtain Hamilton's title, who, by virtue of the deed of Pleasant Davis, was a joint owner of the land. Appellant's position is, that, as no conveyance from Simon P. Davis is shown, there was, therefore, an outstanding paramount title in him. The court below found that the names of Simon P. Davis and Pleasant Davis designated one and the same person, and we are inclined to the opinion that there is evidence fairly warranting this conclusion. But, independently of this consideration, the finding of the court was clearly right. The deed to Hamilton and Carr drew to them the possession of the land described in it, and their possession must be deemed to have commenced on the 26th day of January, 1856, and to have thence uninterruptedly continued in both of them until the execution of the sheriff's deed to the appellant, on the 6th day of May, 1858, and then broken only as to Carr, if broken at all. If it could be presumed that the land then went into possession of the appellant, his possession could not have ripened into a title against his co-owner. Nor could Carr's title by lapse of time have become superior to that of Hamilton. These conclusions are deducible from the two rudimental rules: (1) A deed of land draws possession to the grantee; (2) The possession of one joint tenant is the possession of both. The right which the appellant acquired was such as the judgment debtor possessed, and this was such as the deed of the grantor, designated as Pleasant Davis, could convey. If the deed of Pleasant Davis conveyed no title, then the appellant acquired none; and as the title of appellant relates back to and flows from this deed, it affords presumptive evidence that his grantor had a good right to convey. *Prima facie* at least, there was a right in Pleasant Davis to convey, and if he had such right his conveyance was effectual, not as to one only of his grantees, but as to both. The appellant's only source of title is the deed of Pleasant Davis, and, asserting title thereunder, he necessarily asserts that his grantor had title and a right to convey. The evidence unexplained showed

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title in Pleasant Davis and possession for such a length of time, even if computed from the conveyance to Hamilton and Carr, as would have barred the claims of Simon P. Davis, if he were indeed another than Pleasant Davis.

Appellee insists that, as appellant claims title from Pleasant Davis, he is estopped to question the right of Davis to convey. We need not decide whether this position is or is not correct. It was sufficient for the appellee to show a *prima facie* case, and this was done by the evidence furnished by the deeds and the acts of the parties thereunder. It is laid down by Professor GREENLEAF, that "Where both parties claim under the same third person, it is *prima facie* sufficient to prove the derivation of title from him, without proving his title." 2 Greenl. Ev., section 307. This general principle is recognized and enforced in *Pierson v. Doe*, 2 Ind. 123.

There was no error in assessing the amount of the recovery. The appellee was entitled to recover the purchase-money with interest. This is the measure of damages in actions for the breach of the covenant of seizin. Nor was the appellant entitled to set off the mesne profits during the time appellee was in possession, for he had no right to them. The rightful owner might compel the appellee to account, but the appellant can not.

Judgment affirmed, with costs.

No. 7613.

BALLIETT v. HUMPHREYS.

FIXTURES.—Evidence.—Stave Machine.—Grist Mill.—Line Shaft.—In an action of replevin for possession of a stave machine, consisting in part of a line shaft connecting it with a grist mill, evidence tending to show that the machine was set up under an adjoining shed, so that by means of belting it could be run by the steam engine in the mill; that the line

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shaft was hung from joists in the mill, and that the rest of the machine was not attached to the real estate, justified a finding that the line shaft was personal property.

SAME.—Circuit Court.—Justice of the Peace.—Title to Real Estate.—Jurisdiction.—In such case, objection under section 11, 2 R. S. 1876, p. 607, that the justice of the peace had not jurisdiction of the action, because the title to lands came in question, ceased to be an objection when the cause reached the circuit court, on appeal.

SAME.—Pleading.—Practice.—In such case, in the circuit court, under section 34, 2 R. S. 1876, p. 612, the defendant, without plea, was entitled to show that the articles sued for as personal property were fixtures.

SAME.—Instruction.—In such case, the trial court correctly refused to instruct that if the shaft was bolted on and fastened securely to the joists of the mill, it was a part of the real estate on which the mill was situate.

PRACTICE.—Motion in Arrest.—A motion in arrest of judgment reaches only such defects as are apparent on the face of the record, not cured by the verdict or a statute of amendments, or waived by failure to demur.

SAME.—Costs.—Justice of the Peace.—Circuit Court.—Under section 70, 2 R. S. 1876, p. 627, a judgment in the circuit court for the recovery of property sued for and eight dollars damages will not entitle the defendant to costs, against whom judgment before the justice was simply for the recovery of the property and costs. Reduction of the judgment must be ascertained by a comparison of the judgments, and not the verdicts.

From the Whitley Circuit Court.

C. Clemans and A. G. Clemans, for appellant.

T. R. Marshall and W. F. McNaghy, for appellee.

NIBLACK, J.—This was an action of replevin by Hannah Humphreys against David Balliett for the recovery of a stave machine, consisting of a line shaft, some belting, an equalizer and a bucker. The action was commenced before a justice of the peace of Kosciusko county, where there was a judgment in favor of the plaintiff. The defendant appealed to the circuit court of that county, from which a change of venue was taken to the court below. The cause being at issue and ready for trial in the last named court, the defendant asked leave to file an answer, averring that the articles of property described in the complaint were fixtures, and belonged to, and were a part of, certain real estate upon which a grist mill was situate; that in consequence the title to real estate would be put in issue, and

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that, as the cause was commenced before a justice of the peace, the court had no jurisdiction of the action; but leave to file such an answer was refused. There was a verdict for the plaintiff. Motions for a new trial, and in arrest of judgment, overruled, and judgment on the verdict. The defendant moved the court to tax the costs of the appeal against the plaintiff upon the alleged ground that the amount of the judgment had been reduced more than five dollars, but that motion was also overruled, and the defendant has appealed to this court from the judgment thus rendered against him.

The appellant complains that the court erred in refusing him permission to file an answer to its jurisdiction as set forth above, arguing that proof of the facts set up in his proposed answer would have shown a want of jurisdiction in the court to try the cause.

We are unable, however, to see that the appellant was injured by the exclusion of the answer he asked leave to file. In the first place, he was entitled to show that the articles of property sued for were fixtures, without specifically pleading that fact in defence, that constituting a question which went to the merits of the action. 2 R. S. 1876, p. 612, sec. 34. In the next place, it was no objection to the jurisdiction of the court that the title to real estate would become an issue at the trial. Such an objection, if it had been properly made before the justice, would have required him to certify the cause to the circuit court of his county; but, even then, its force and effect would have been expended when the cause reached the circuit court. 2 R. S. 1876, p. 607, section 12.

The appellant, also, complains that the court erred in overruling his motion for a new trial.

First. Because the verdict was not sustained by the evidence.

Secondly. Because the court improperly refused to give an instruction prayed for by him.

The appellant argues that the evidence showed the line shaft to have been permanently attached to an adjacent grist

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mill, and hence a fixture not recoverable in an action of replevin.

There was evidence tending to show that the machine in controversy was set up in 1869, under a shed adjoining a steam grist mill, as portable machinery, so that by means of belting attachments it could be run by the engine in the mill; that the line shaft was fastened to hangers which were bolted to joists in the mill, so as to make it effective for the purposes for which it was used; that the remaining articles constituting the machine were not in any way attached to the realty where they were used.

Upon this evidence the jury were justified in finding, as under the instructions of the court they in effect did, that the line shaft was personal property.

The instruction, which the court refused to give, asked the court in substance to say to the jury that if the line shaft was bolted on, and securely fastened to, the joists of the mill, they ought to find that it was a part of the real estate on which the mill was situate, and hence not an article of property for which an action of replevin could be maintained.

This instruction was correctly refused:

First. Because the purposes for, and the circumstances under which, the line shaft was fastened to the mill were a proper subject of inquiry for the jury.

Secondly. Because the subject-matter of the instruction was fully covered by instructions given, upon its own motion, by the court.

The motion in arrest of judgment was based upon the ground that the evidence showed the line shaft to have been a fixture, and consequently not subject to recovery in an action of replevin, and the decision of the court overruling that motion is also complained of as erroneous.

But no question was raised upon the evidence by the motion in arrest of judgment. All questions arising upon the evidence had been presented by, and settled upon, the motion for a new

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trial, and hence were adjudicated questions when the motion in arrest was interposed.

A motion in arrest of judgment reaches only such defects as are apparent on the face of the record, and as are not cured by the verdict, or some statute of amendments, or waived by failing to demur. *Smith v. Dodds*, 35 Ind. 452; *Adamson v. Rose*, 30 Ind. 380.

The appellant further complains that the court erred in refusing to tax the costs of the appeal against the appellee. 2 R. S. 1876, p. 627, section 70.

At the trial in the circuit court the value of the property replevied was assessed at \$30 less than it was found to be worth by the jury which tried the cause in the justice's court, and the appellant contends that this reduction in the assessed value of the property amounted, in legal effect, to a reduction of the judgment in the circuit court by that sum. It is, however, by a comparison between the judgments, and not between the verdicts, that we are to ascertain whether the judgment rendered by the justice has been reduced.

In this case the judgment before the justice was simply for the recovery of the property and costs of suit. The judgment in the circuit court was for the recovery of the property and \$8 in damages.

With the record of these facts before us, we know of no principle upon which we could hold that the judgment before the justice was reduced in any amount by the judgment rendered in the circuit court.

The judgment is affirmed, with costs.

Leary v. Meier.

No. 8942.

LEARY v. MEIER.

LANDLORD AND TENANT.—Lease.—Evidence.—Real Estate, Action to Recover.

—In an action to recover real property, brought by a landlord against his tenant before a justice, a lease which purports to have been executed by the latter, and is referred to in the complaint, may be read in evidence without proof of its execution.

SAME.—Parol Evidence.—Where a lease fixes the commencement and duration of a term, parol evidence offered to show the time of its termination is properly refused.

SAME.—Tenancy from Year to Year.—Notice.—Rent.—A tenancy from year to year may be terminated by ten days notice to quit for a failure to pay rent, unless such rent is paid at the expiration of such time.

SAME.—Eviction.—Suspension of Rent.—It is not error to refuse to instruct the jury that an eviction of the tenant by the landlord suspends rent when it appears from the evidence that rent had accrued and remained unpaid before the alleged eviction.

INSTRUCTION.—Evidence.—Practice.—It is not error to refuse to give an instruction which is not applicable to the case made by the evidence.

SAME.—Proof of Averments in Different Paragraphs of Complaint.—Where the complaint consists of more than one paragraph, it is proper for the court to instruct the jury that the burden is upon the plaintiff, and, to entitle him to recover, he must prove by a fair preponderance of the evidence all the material averments in some one of the paragraphs of the complaint. Such an instruction does not inform the jury that proof of one paragraph entitles him to recover on all of them.

SUBPŒNA.—Service.—Witness.—Continuance.—No person other than the sheriff or his deputy is authorized to serve a subpœna, and a party who has not thus subpœnaed his witness, but has served the subpœna himself, is not entitled to a continuance on account of the absence of such witness.

From the Hancock Circuit Court.

J. A. New and C. E. Barrett, for appellant.

J. N. Scott, for appellee.

BEST, C.—This action originated before a justice of the peace, and was brought by the appellee against the appellant to recover the possession of the cellar, first floor and the two rear rooms of the second story of a store building in Indianapolis, held by the latter as tenant of the former, because of the latter's failure, as is averred, to pay rent after ten days

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notice. The complaint consisted of three paragraphs. The first and second averred that the cellar and first floor were held under a written lease, a copy of which was filed, and the third was for the recovery of the rear two rooms. A trial was had and the cause appealed to the circuit court. After an issue was formed upon a counter-claim, the venue was changed to the Hancock Circuit Court, where the appellant made an unsuccessful motion for a continuance. The issues were then submitted to a jury, and a verdict returned for the appellee. Over a motion for a new trial, judgment was rendered upon the verdict. From this judgment the appellant appeals, and assigns as error, among others, that the court erred in overruling the motion for a new trial.

This motion embraces many reasons, but we will notice only those noticed by the appellant in his brief:

1st. It is insisted that the court erred in admitting in evidence, without proof of its execution, the lease mentioned in the first and second paragraphs of the complaint.

There was no error in this ruling. The lease purported to have been executed by the appellant, and its execution was not denied by an affidavit before the commencement of the trial, nor by a pleading under oath. It was referred to in the complaint, and in such case it may be read in evidence on the trial without proof of its execution. 2 R. S. 1876, p. 75, section 80.

2d. It is insisted that the verdict is contrary to the evidence, because there was no proof that any rent was due for the two rooms at the time the notice was served.

The record does not support this position. An examination of the evidence shows that the rent for the rooms was payable either monthly or quarterly; that none was paid after August, 1879, and the notice was not served until the 21st of January, 1880. We can not disturb the judgment on this ground.

3d. It is also insisted that "the court erred in refusing to allow the appellant to prove when said lease expired."

This ruling was right. The lease fixed the commencement

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and the duration of the term. It provided that the appellant should hold "for and during the term of one year, with the privilege of five years, from the 4th day of May, 1874." If the appellant had not exercised the privilege of keeping the premises longer than one year, it would have expired at the expiration of that time; but he did exercise such privilege, and the lease expired at the end of five years. The facts being undisputed, if there was any question about it, that question was for the court, and not for the jury. There was no ambiguity about the lease at all. Its duration depended upon whether or not the appellant exercised the privilege of keeping the premises longer than one year, and as he did this, the lease, by its terms, fixed the length of the term. There was no error in this ruling.

4th. It is further insisted that the court erred in refusing to instruct the jury, that, if the appellant continued to occupy the premises after the expiration of the lease, without any contract and with the consent of the appellee, the tenancy was from year to year, and could not be terminated by ten days notice to quit for a failure to pay rent.

This instruction was properly refused. A tenancy from year to year may be terminated by ten days notice to quit for a failure to pay rent, unless such rent is paid at the expiration of such time. Where the rent is not paid until the expiration of the year, three months notice, in writing, before the expiration of the year is necessary to terminate such tenancy; but, where the rent is payable before the end of the year, such tenancy, like any other, may be terminated by a failure to pay rent after ten days notice. 2 R. S. 1876, p. 338, sec. 2, and p. 340, sec. 4.

5th. The court refused to instruct the jury as follows: "An eviction of a tenant by a landlord of rented premises suspends the rent. The modern doctrine as to what constitutes an eviction is, that actual physical expulsion is not necessary, but an interference with the tenant's beneficial enjoyment of the rented premises will amount to an eviction in law, and when such is the case the rent is suspended."

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This instruction was properly refused, because it was not applicable to the case made by the evidence. By the terms of the lease mentioned in the complaint, the rent was payable monthly, in advance. The amount of the rent, by agreement, was afterward reduced from fifty to twenty-five dollars per month. The appellee claimed that no other change was made; while the appellant claimed that a new agreement was made in August, 1879, whereby he leased the premises for three years from that time, at two hundred dollars per year, without any time being specified for the payment of the rent. It was conceded that no rent was paid after August, 1879. The acts which the appellant claimed amounted to an eviction occurred on the 16th of October, 1879, and at that time two months rent, as claimed by the appellee, remained unpaid. An eviction does not forfeit rent already accrued. The rule is thus stated in Taylor's Landlord and Tenant, at section 379:

"Nor will an eviction from either the whole or part of the demised premises, have any effect upon rent due at the time of the eviction; for the landlord is still entitled to collect whatever rent has accrued, before the tenant actually quit the possession. So, if rent is payable quarterly in advance, an eviction during the quarter, but after the rent becomes due, does not bar an action for rent; the most an evicted tenant can equitably claim under these circumstances, is a deduction for so much of the quarter as elapses after his eviction."

This language is applied to an action brought to recover rent, but it is equally applicable to this kind of action. If an action for rent is not barred by an eviction occurring after the rent becomes due, certainly such tenancy may be terminated by a notice to quit for a failure to pay rent accrued before a partial eviction. Again, as the appellant retained possession of the premises, and refused to surrender them, the most that he could claim from an interference with his beneficial enjoyment was a deduction from the rent equal to the damages sustained. There may have been less than the amount of rent

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due, and, if so, the excess of rent was not suspended. There was, we think, no error in refusing to give the instruction.

6th. The appellant complains of the following instruction given by the court: "This is a civil suit, and is to be determined by a preponderance of the evidence. The burden is upon the plaintiff, and, to entitle him to a verdict in his favor, he must have proved by a preponderance of the evidence all of the material averments of some one of the three paragraphs of his complaint."

The third paragraph of the complaint was for the recovery of a part, and the first and second paragraphs were for the recovery of a different part of the same building. These parts were held under separate leases, and the appellant insists that the instruction informed the jury that, if the appellee proved one paragraph of his complaint, he was entitled to recover the whole property. The instruction is not susceptible of such construction. It informed the jury that the appellee could not recover at all without proving the averments of at least one paragraph of his complaint. How much of such property he could recover upon such proof, it did not state. If the appellant was apprehensive that the jury might infer, that, upon proof of one paragraph, the appellee was entitled to recover the whole property, he should have requested the court to instruct the jury, that upon such proof the appellee was only entitled to recover the property embraced in such paragraph. A refusal to thus instruct would have furnished just ground of complaint. The instruction was correct as far as it went, and is not erroneous because it did not go further. *Boffandick v. Raleigh*, 11 Ind. 136; *Chamness v. Chamness*, 53 Ind. 301.

7th. The last ground urged for a reversal is, that the court erred in refusing to continue the cause on account of the testimony of an absent witness.

It appears from the record, that the cause was set for trial on the 18th day of June, 1880, and the appellant at that time moved the court for a postponement of the trial on account of the absence of one John Strain, who had been served with

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a subpoena by the appellant. This motion was resisted on the ground that a party has no authority to subpoena his witnesses, and for that reason diligence had not been used to secure the attendance of this witness. The court adopted this view of the law, but postponed the trial until the 28th of June, saying that, while a party has no authority to subpoena witnesses, the appellant, in view of the prevailing practice, may be taken by surprise, and that time would be given to enable him to place a subpoena in the hands of the proper officer and have it served. Another subpoena was taken out, served by the appellant upon the witness, and, upon his failure to attend on the 28th of June, a motion to continue the cause for the term was made on account of the witness' absence. This motion was overruled, and this ruling is the ground of complaint.

The appellee insists that no person other than the sheriff or his deputy has any authority to serve a subpoena, and for that reason diligence was not shown.

Section 229 of the code provides that a summons for witnesses "may be served by the party or any other person, or by the sheriff. The party or any other person than the sheriff, shall not be entitled to fees for the service."

This has been the law since 1852, and is yet, unless changed by the act of March 31st, 1879. This act is an act entitled "An act fixing certain fees to be taxed in the offices, and the salaries of officers therein named; * * * defining certain duties and liabilities of officers and persons therein named," etc.; and by the 26th section it is provided, that "The sheriffs of the several counties of the State shall tax and charge the following fees and none other, to wit: * * * For each mile necessarily travelled in going and returning to serve process, 10 cents. * * * For serving each person named in a summons or a subpoena, with mileage as above—all such service must be made by the sheriff or deputy, and his returns endorsed thereon, 35 cents, and for each copy required, 25 cents." Acts 1879, p. 130.

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This statute is plain, and needs no construction. By its terms all summonses and subpoenas must be served by the sheriff or his deputy. This requirement seems necessarily to change the rule prescribed by section 329 of the code. By that section the service of a subpoena might be made by the sheriff or any other person, but by the act of March 31st, 1879, such service must be made by the sheriff or his deputy. This would seem to exclude a service by any other person. The appellant insists that the act of 1879 does not change the law as to the service of a subpoena, but it merely authorizes certain fees for service made by the sheriff or deputy; in other words, it prohibits him from taking fees for the service of a subpoena made by any person other than himself or deputy. We can not adopt this view. The law before did not authorize him to tax fees for any service not rendered by himself or deputy, and the act of 1879 does not change the law in that respect. The change consists in requiring all subpoenas to be served by him or his deputy, and this change so modifies the rule prescribed by section 329 as to prohibit the service of a subpoena by another person. As the law requires a witness to be subpoenaed by the sheriff or deputy, in order to compel his attendance, it follows that the appellant had not used diligence to obtain the testimony of the absent witness, and therefore the motion was properly overruled.

This disposes of all the questions presented. There is no error in the record, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things affirmed, at the costs of appellant; and, it appearing that the appellee has died since the cause was submitted, judgment is rendered as of the term at which the submission was made.

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No. 8544.

CHAMBERS v. CHAMBERS ET AL.

STATUTE OF LIMITATIONS.—*Account Current.—Answer.—Reply.—Pleading.—*

A reply to an answer pleading the statute of limitations, which states that the account sued on was a mutual running account, and that every item of the bill of particulars is one item thereof, and shows the last item to be within six years, is sufficient.

SPECIAL FINDING.—*General Verdict.—Practice.—*It is only in cases where the special findings are irreconcilable with the general verdict that they control it.

SAME.—On trial of an action on an account current, an answer of the jury to the question, "What amount, if any, have you allowed the defendant on the account in his favor in your general verdict?" is not repugnant to the general verdict for the plaintiff for the excess due him.

From the Madison Circuit Court.

J. W. Sansberry, M. A. Chipman and E. P. Schlater, for appellant.

J. A. Harrison and R. Lake, for appellees.

FRANKLIN, C.—Appellees sued appellant on an account for sawing lumber, amounting to \$297.21.

Appellant answered by a denial, and the statute of limitations. Reply in denial, and mutual running accounts. Demurrer to second paragraph of reply overruled.

Trial by jury; verdict for appellees, and answers to interrogatories returned by jury. Motions by appellant for judgment on the answers to the interrogatories notwithstanding the general verdict, for a new trial, and in arrest of judgment, were all overruled, and proper exceptions reserved. Judgment on the verdict for appellees for \$177.06.

Appellant has assigned in this court the following alleged errors:

1st. The overruling of the demurrer to the second paragraph of the reply.

2d. The overruling of the motion for judgment upon the answers to the interrogatories.

3d. The overruling of the motion for a new trial.

4th. The overruling of the motion in arrest of judgment.

The second paragraph of the reply reads as follows:

"And for a further amended reply to the second paragraph of the answer the plaintiffs say that there had been from 1870 to 1876 a mutual running account between the parties to this suit, a bill of particulars of which is herewith filed. And every item of the plaintiffs sued on herein is one item of said mutual running account between the parties."

Then follows a bill of particulars of the defendant's side of the account.

We think this paragraph was a sufficient reply to the statute of limitations in the answer; and there was no error in overruling the demurrer to it.

The following are the interrogatories and answers returned by the jury with their verdict, and upon which appellant moved for judgment in his favor, except as to \$2.56.

"PLAINTIFFS' INTERROGATORIES.

"1st. How much of plaintiffs' claim, if any, have you allowed them in your general verdict?

"Answer. One hundred and seventy-seven dollars and six cents (\$177.06).

"2d. What amount, if any, have you allowed the defendant on the account in his favor, in your general verdict?

"Answer. Seventy-seven dollars and ninety-four cents (\$77.94).

"3d. Have you allowed him, the defendant, in your verdict the note alleged in the reply to have been paid for George W. Chambers?

"Answer. Yes."

"DEFENDANT'S INTERROGATORIES.

"1st. In what year did the plaintiffs perform and complete their first job of sawing for the defendant?

"Answer. 1870.

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"2d. In what year did the plaintiffs perform and complete their next or second job of sawing for the defendant?

"Answer. 1871 and 1872.

"3d. In what year did the plaintiffs perform and complete their last job of sawing for the defendant?

"Answer. 1876.

"4th. What items, if any, of the plaintiffs' cause of action accrued within six years before the commencement of this suit—give dates and amounts?

"Answer. The sawing of four hundred and twenty-six feet in 1876.

"5th. Did not all the items in the plaintiffs' cause of action accrue and exist more than six years before the commencement of this suit, except the four hundred and twenty-six feet of sawing at sixty cents per hundred?

"Answer. Yes."

The answers were each signed by the foreman of the jury.

We do not think that these answers or special findings are either repugnant or contradictory to the general verdict, but are easily reconcilable therewith. The only apparent conflict is in the amount allowed to plaintiffs on their claim. And in this we understand the jury to mean the amount in addition to what they had allowed defendant on his side of the accounts. For they say they allowed the defendant \$77.94, and the plaintiffs \$177.06, and returned their general verdict for the latter amount.

It is only in cases where the special findings are irreconcilable with the general verdict that they are to control the general verdict. *Adams v. Cosby*, 48 Ind. 153; *The Indianapolis, etc., R. R. Co. v. Stout*, 53 Ind. 143.

The court did not err in overruling the motion of appellant for judgment on the special findings.

Appellant in his brief makes no point upon the overruling of the motion for a new trial, except that he claims that the judgment was too large, that it ought to have been in favor of appellees for \$2.56, and for appellant for costs. This claim

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is made upon the proposition that all of the plaintiffs' account except the last item for \$2.56 was barred by the statute of limitations. In this we think appellant is mistaken. Appellees proved their claim to the amount of over \$200. Appellant testified that he had furnished appellees saw-logs during the time they were doing the sawing sued for, as he thought sufficient to settle their account.

We think the proof showed that there were mutual running and unsettled accounts between them which prevented appellees' claim from being barred by the statute of limitations.

The evidence was very conflicting, but tended clearly to sustain the verdict of the jury; and, according to a well established rule, this court will not, by a comparison of the weight of the testimony, disturb the verdict of the jury.

No objection has been pointed out to the overruling of the motion in arrest of judgment, nor do we perceive any.

We find no available error in this record. The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and the same is hereby, in all things affirmed, with costs.

No. 8456.

WEBB v. CORBIN.

PROMISSORY NOTE.—*Fraud in Procuring Signature.—Negligence.*—A party whose signature to a promissory note payable in bank is obtained by fraud as to the character of the paper itself, he being unable to read it and it having been misread to him, and he not being guilty of negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound than if it were a total forgery, the signature included.

SAME.—*Negligence.—When Question of Fact and When of Law.*—When a negotiable promissory note has been obtained by fraud as to the charac-

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131	c
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ter of the paper, the maker signing in the belief that it was a different contract, the question whether he was negligent in signing, or in failing to ascertain the character of the paper, is ordinarily one of fact; but, if the plea purports to set out all the facts and circumstances under which the note was obtained, the question may be decided upon demurrer as one of law.

SAME.—Pleading.—Ratification.—Ratification makes good from the beginning, and, under a denial of an answer of fraud in obtaining a note, subsequent ratification may be proved without pleading it specially.

SAME.—Non Est Factum.—A special answer sworn to, which amounts to a plea of *non est factum*, closes the issue and does not admit of a reply.

From the Montgomery Circuit Court.

M. W. Bruner, for appellant.

G. W. Paul and *J. E. Humphries*, for appellee.

WOODS, J.—The appellant, as endorsee before maturity, sued the appellee, as maker, of a promissory note made negotiable by the law merchant.

The appellee filed an answer in two paragraphs, which the court held good upon demurrer for want of facts. The second paragraph, however, was withdrawn from the consideration of the jury by the charge of the court, leaving for our consideration the first only. Its averments are substantially as follows:

That, near the date of the note sued on, two strangers came to the house of the defendant, pretending to be agents for the "Western Medical Works," of Indianapolis, which they represented to be an extensive institution; that one of them pretended to be a physician, and to be travelling for the purpose of advertising, and appointing agents for, said institution; that the defendant was at the time sixty-eight years old, sick and weak in body and mind, being afflicted with palsy, and living by himself, without any family, at his home in the country; two miles from any town; that the pretended physician examined the defendant and declared that said institution could "cure him sound and well;" that the parties then said they wanted to establish an agency for the sale of their medicines in his neighborhood, and if defendant would accept the

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agency, they would furnish him the medicines and he need not pay for them until sold, and the institution would treat him for palsy free of charge so long as he would sell medicines; that he could sell the medicines without trouble; and the defendant finally told them that if it would not cost him anything, and they thought he could be cured, he would try to sell medicines for them; that they then professed to prepare and fill out a contract of agency that they used in such cases, he telling them in the mean time that he was so old, and his eyes so weak, that he could not read the contract, and had lost his glasses, except an old pair, through which he could not see; that he had retired from business, and was not capable of doing business of that kind; whereupon they assured him that he would in no wise be bound, except to account for the medicines sold; that one of the parties then pretended to prepare and fill up some kind of an agreement in writing, purporting to be, in some respects, in the similitude of a promissory note for the defendant to sign; that at the time the defendant was very weak, sick and nervous, and his eyesight was so dim from disease and old age that he could not read either printing or writing, and he had lost his glasses, and so told the parties; that there was no person in the defendant's house at the time besides himself and the strangers aforesaid; that they said they would read the writing to him, and he relied upon them to read it to him correctly; that one of them pretended to read the contract to him; that, as it was read, the defendant was to be required only to pay the sum of \$300 when he should sell enough of said medicines to amount to that sum; that the first lot of medicines to be sent to him would be worth that sum, and the defendant was only to account for the medicines so sold out of the proceeds of the sales, and not otherwise in any event to be bound; that the defendant relied upon the representations of said pretended agents as to the contents of said agreement, and believed they had read it to him correctly; and, having fully explained to them that his eyesight was dim, his spectacles

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lost, and that he could not read the agreement, he did, upon their assurance that they had read the instrument correctly, sign his name to it; that the defendant never did intend to make and deliver to said parties a negotiable promissory note, or any obligation that would in any way bind him other than as above stated, and thinking and believing he had only signed the contract of agency as read to him, and was not otherwise bound, he permitted said parties to take the same away with them; that his signature to the note sued on was obtained in manner as above stated. Wherefore, etc.

This answer was duly verified by the defendant.

The case made by this answer is fairly distinguishable from the cases of *Woollen v. Whitacre*, 73 Ind. 198; *Ruddell v. Fhalor*, 72 Ind. 533; *Cornell v. Nebeker*, 58 Ind. 425; *Kimble v. Christie*, 55 Ind. 140; *Nebeker v. Cutsinger*, 48 Ind. 436; *American Ins. Co. v. McWhorter*, ante, p. 136; and comes fairly within the rule, well settled by authority and on principle, that a "party whose signature to a paper is obtained by fraud as to the character of the paper itself, who is ignorant of such character, and has no intention of signing it, and who is guilty of no negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included." *Cline v. Guthrie*, 42 Ind. 227, and cases cited.

The plea shows that the appellee was sick and enfeebled in mind and body, was himself incapable of reading the contract, and had no one to whom he could appeal for assistance, and that the parties who procured his signature gave a false reading of it, whereby it was made to appear to be what he intended to sign, while it was in fact a widely different contract from what he intended to sign; and, upon all the facts as stated, the appellee was not guilty of negligence in affixing his signature. The question of negligence in such a case is largely a question of fact to be determined by the jury, and so it was left in this instance by the instructions of the court.

The answer, however, after stating the facts, concludes as we have seen, with the allegation that the signature was procured "in manner as above stated ;" which is equivalent to an averment that the facts stated constituted all the facts relevant to the subject which occurred, and makes it a question of law for the court whether, in the light of the circumstances alleged, excluding the supposition of any other facts, the appellee acted with the degree of care which the law requires—that is to say, with the prudence of ordinary men similarly situated.

The exceptions taken to the charges of the court to the jury present no different question from that raised by the demurrer to the answer and already considered.

The court sustained a demurrer to a special paragraph of reply, wherein it is averred that, after he had learned the character of the note which he had signed, the defendant had received, and retained possession of, medicines sent to him under the contract and thereby had ratified the note.

If the facts stated constituted a ratification, which may be questioned, the effect was to make the note good from the beginning ; and the proof was therefore admissible under the general denial which the appellant had pleaded to the answer. Indeed, the answer was not such as to call for a reply of any kind. It was a special *non est factum*, which itself closed the issue, and neither required, nor, strictly speaking, admitted of, a replication. *The State, ex rel. Griswold, v. Blair*, 32 Ind. 313 ; *Uhl v. Harvey*, ante, p. 26. And any proof by which it might have been shown that the note was in the beginning, or by ratification had become, binding upon the appellant, was admissible under that issue.

Judgment affirmed, with costs.

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No. 8703.

JULIAN v. THE HOOSIER DRILL COMPANY ET AL.

TRADE-MARK.—Damages.—Injunction.—Property in the use of a word as a trade-mark, to designate manufactured goods, such as the word “Hoosier,” to distinguish a grain drill, may be acquired by adoption and exclusive use, and, when acquired, the unauthorized use by another of the mark, to designate similar goods, is a wrong which may be compensated by damages, and prevented by injunction.

SAME.—A trade-mark, used to designate goods manufactured under letters-patent, is assignable with the letters-patent, and the right to damages accrued for infringement is also assignable.

SAME.—Non-User.—Abandonment.—License.—Property in a trade-mark may be abandoned and thereby lost, but a complaint for infringement, which shows non-user for a year, does not disclose an intention to abandon; and without such intention there is no abandonment by mere non-user. Such non-user might possibly imply a gratuitous license to others to use the mark for the time being, and thereby preclude the recovery of damages for the time; but this license is revocable, and does not preclude the remedy by injunction for the future.

From the Wayne Circuit Court.

T. J. Study, J. B. Julian and J. F. Julian, for appellant.

— *Wood*, — *Boyd and H. C. Fox*, for appellees.

MORRIS, C.—The appellant brought this suit against The Hoosier Drill Company, to recover damages for an alleged infringement of her rights to the use of the word “Hoosier,” as a trade-mark. John Ingels, as the administrator of Joseph Ingels, who refused to join with the appellant as plaintiff, was made a defendant to answer as to the interest of his intestate in the suit.

The first paragraph of the complaint states, that the appellant’s assignor, Joseph Ingels, prior to the 20th day of March, 1876, invented and discovered certain new and useful inventions and improvements in grain drills, and that the same were secured to him by various letters-patent, issued by and out of the United States Patent Office at divers times, the first on the 6th day of January, 1863, and the last on the 4th day of October, 1870; that on or about the 6th of January,

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1863, the said Joseph Ingels commenced the manufacture and sale of said grain drills in the town of Milton, Wayne county, Indiana, and continued the manufacture and sale of said drills down to the 20th day of January, 1876, during which time he manufactured 20,000 of said drills under said letters-patent; that, at the time said Ingels commenced the manufacture of said drills, he devised and adopted, as his trade-mark to be used, and which he used on said drills, to designate the grain drills which he was manufacturing and selling, the word "Hoosier" as the name of said drills, and that he affixed and inscribed the same to and upon all such drills by him manufactured and sold, and sold the same throughout this and the adjoining States of the Union, in which there was a great demand for them, as they were well known, and the "Hoosier Drill," so manufactured by him, was regarded as superior to any grain drill manufactured, by farmers, dealers in agricultural implements and those using the same; that neither at, nor prior to, the time said Joseph Ingels devised and adopted said word, symbol or term "Hoosier," as his trade-mark, was the same, nor had it been, used by any other person as a trade-mark upon any grain drill or drills; that said Ingels continued to own said trade-mark and letters-patent, and the right to manufacture grain drills under said letters-patent, and the exclusive right to use said trade-mark on grain drills, until the 27th of February, 1877; that from the 20th of March, 1876, to the 27th day of February, 1877, the Hoosier Drill Company was engaged in the manufacture of drills similar to those invented by said Joseph Ingels, and, without license so to do, unlawfully and wrongfully used and affixed to the drills manufactured by the appellee, during said period, said trade-mark, "Hoosier," and sold them with such trade-mark inscribed thereon, and that such trade-mark, so inscribed on said drills, enhanced the value of each drill upon which it was so inscribed, in the sum of two dollars, and that altogether said Joseph was damaged \$5,000; that the said Hoosier Drill Company owed said sum to said Ingels, and

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that, on the 27th day of February, 1877, he sold and transferred, for a valuable consideration, said claim to the appellant.

The second paragraph of the complaint is like the first, except that it alleges that Joseph Ingels devised and adopted the word "Hoosier" as a trade-mark in the year 1857, and that he was then engaged in the manufacture and sale of grain drills, and then, and continuously thereafter, until the 27th day of January, 1877; that he used on said drills by him manufactured and sold, as a trade-mark and name to designate the particular drill by him made and sold, the word "Hoosier." That on the 27th day of February, 1877, the said Ingels transferred and assigned to the appellant all of said letters-patent, by an instrument in writing, duly executed by him, and also all the right to and property in said trade-mark which he then had or owned, and the exclusive right to use said trade-mark upon grain drills.

It is then averred, that, from the time the appellant purchased said letters-patent and said trade-mark, she had the right to manufacture and sell grain drills with said trade-mark affixed thereto and inscribed thereon, and the exclusive right to use the same; that, ever since she became the owner of said trade-mark, the said Hoosier Drill Company has been engaged in the manufacture and sale of grain drills, similar in appearance and in all respects to the said grain drills manufactured and sold by said Ingels, and has, during all said time, manufactured and sold 10,000 of said drills with the trade-mark of the appellant affixed thereto and inscribed thereon, unlawfully, wrongfully and without leave or license so to do; that said trade-mark, so affixed by said company to said drills, enhanced the value of each drill two dollars; that, since she became the owner of said letters-patent and said trade-mark, it has been her intention to engage in and continue the manufacture and sale of grain drills under said letters-patent, and to use said trade-mark thereon, as soon as she could make arrangements so to do; that said trade-mark

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was and is of great value in the sale of grain drills, and particularly in the sale of the drills manufactured by said Hoosier Drill Company; that said company had realized \$5,000 from the use of said trade-mark since her purchase of the same, for which she demands judgment. She also asks that the appellee be enjoined, etc.

The appellee The Hoosier Drill Company appeared and demurred to the complaint, on the following grounds:

1. There is a misjoinder of causes of action in each of said paragraphs.
2. The plaintiff has no capacity to sue.
3. There is a defect of parties plaintiffs.
4. There is a defect of parties defendants.
5. The said paragraphs do not either of them state facts sufficient to constitute a cause of action against defendant.

The court sustained the demurrer, and, the appellant declining to amend, judgment was rendered for the appellee.

The sustaining of the demurrer is assigned as error.

It seems to be agreed by the counsel for the parties, that the word "Hoosier" may be adopted, used and applied as a trade-mark. The case of *Congress & Empire Spring Company v. High Rock Congress Spring Company*, 45 N. Y. 291, and other cases that might be referred to, fully justify this conclusion. Coddington on Trade-Marks, section 680, *et seq.*

It is not seriously questioned that Joseph Ingels used the word "Hoosier" as a trade-mark, and that, by affixing it to and inscribing it upon grain drills manufactured by him and sold in this and adjoining States, as alleged in the complaint, he adopted it as his trade-mark so as to secure the exclusive right to it as a trade-mark, to designate the kind of grain drills by him manufactured and sold.

It seems also to be agreed, that a party may have a property in a trade-mark, and that his right to and property in it may be transferred and assigned. But the parties are not agreed as to the manner in which, nor as to the circumstances under which, such assignment may be made.

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It is insisted by the appellees that, upon the facts stated in the first paragraph of the complaint, no cause of action exists in favor of the appellant:

First. Because it appears that, during the time the appellee used the trade-mark, the said Ingels, the appellant's assignor, was not engaged in manufacturing grain drills; that he had abandoned the business of manufacturing and selling drills from the 20th day of March, 1876, until and after the 27th day of February, 1877, the period, as stated in said paragraph, during which the appellee used the same, and that he thereby relinquished and abandoned the use of said trade-mark to the public, so that any one had a right to use and adopt it.

✓ Second. Because the claim of the said Joseph Ingels to damages for the infringement of his right to said trade-mark was not assignable.

It is also insisted by the appellee that, upon the facts stated in the second paragraph of said complaint, there was no valid assignment to the appellant of said trade-mark; that, if there was a valid assignment, no damages are shown to have accrued to the appellant.

Assuming that Joseph Ingels had adequately appropriated the word "Hoosier" as a trade-mark, which, as before remarked, is hardly questioned by the appellees, that he had, as stated in the first paragraph of the complaint, ceased from the 20th of March, 1876, until the 27th of February, 1877, to manufacture and sell the grain drills to which he had been for years accustomed to affix the word as a trade-mark, can it be fairly and legally inferred that he had, by such temporary suspension of the business, abandoned to the public his right to and property in the trade-mark? We think not. The question of abandonment is one of intention, and the burden of establishing it lies upon the party who affirms it. Unless, therefore, it clearly and affirmatively appears from the facts stated in the complaint, it must be brought forward as a defence by answer. From the facts stated in the complaint, it

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appears that Joseph Ingels had secured to him by letters-patent, the exclusive right as the original inventor to useful and valuable improvements in grain drills, which right, under such letters, had some years to run after the 27th of February, 1877. He had been, as the complaint avers, engaged for several years in the profitable manufacture and sale of his improved drill, and had at all times affixed to, and inscribed upon, such drills the word "Hoosier" as his trade-mark. In view of these facts, it can not be inferred, from less than a year's suspension of the business by Ingels, that he intended to abandon either the business or his right to said trade-mark. The suspension must be, presumptively at least, attributed to indisposition or inability, rather than to an intention to abandon valuable rights. Browne says that the question of abandonment is one of intention, and that "A person may temporarily lay aside his mark, and resume it, without having in the mean time lost his property in the right of user. Abandonment, being in the nature of a forfeiture, must be strictly proven." It is incumbent upon those alleging the defence of abandonment, to show that the right had been relinquished to the public by clear and unmistakable evidence. Browne on the Law of Trade-Marks, section 681; *Dental Vulcanite Co. v. Wetherbee*, 3 Fish. Pat. Cas. 87; *American Hide, etc., Co. v. American Tool, etc., Co.*, 4 Fish. Pat. Cas. 284, 305.

In the latter case, SHEPLEY, J., in instructing the jury, says: "Abandonment means a general abandonment to the public, and must be shown affirmatively and positively as affecting the interest of the party." True, this was said as to the rights of a patentee, but the principle is the same whether applied to a patent or a trade-mark.

It is also insisted that as it is not alleged in the complaint that Joseph Ingels did not, at the time, know that the appellee was using said trade-mark, he must be presumed to have known it, and that it was his duty to object promptly to the appellee's usurpation of his rights, and that, if he did not, he must be held to have acquiesced, and thus estopped himself

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to complain. The facts stated in the complaint do not show acquiescence on the part of Joseph Ingels in the alleged invasion of his rights by the Hoosier Drill Company. Did it affirmatively appear in the first paragraph of the complaint, that, with knowledge of the facts, Joseph Ingels had stood by and seen the appellee use his trade-mark without objection, though it would not establish abandonment, it would be a sufficient answer to the claim for the damages set forth in the first paragraph of the complaint. But such acquiescence is not alleged in the first paragraph of the complaint. If there was acquiescence on the part of Joseph Ingels, it must be shown by answer. Browne on the Law of Trade-marks, sections 684 and 685; *Taylor v. Carpenter*, 3 Story, 458; *Taylor v. Carpenter*, 2 Woodb. & M. 1; *Amoskeag Manf. Co. v. Spear*, 2 Sandf. 599.

We do not think it can be assumed from the facts stated in the complaint, that the alleged infringements of the rights of Joseph Ingels by the appellee resulted, at most, in but nominal damages to him. True, it must appear, in order to maintain the action to secure substantial relief, that substantial loss must have been sustained by him in consequence of the mal-appropriation of his trade-mark, but the ground of the action, the wrong, is the affixing of the trade-mark to drills which the public purchase, thereby erroneously supposing them to have been the product of Ingels. Browne Trade-Marks, secs. 499, 500. It is said that no certain and fixed rule for damages can be established in cases like this. *Taylor v. Carpenter*, 11 Paige, 292. Browne says, sec. 503: "The criterion is indemnity; and in estimating the actual damage, the rule is to give the value of the use of the thing during the illegal user, or, in other words, the amount of profits. * * The proper measure of damages, in case of violation of a trade-mark, is generally the profit realized upon the sales of goods to which the spurious marks were attached." We think we can not say, as matter of law, that, upon the facts stated in the first paragraph of the complaint, Ingels was not entitled to damages.

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We also think it was competent for Ingels to sell and transfer, by assignment, his claim for damages to the appellant.

By section 783 of the code, the cause of action set forth in said paragraph would survive. Such a claim is assignable. Pomeroy on Remedies and Remedial Rights, section 147, and cases there cited.

We conclude that the court erred in sustaining the demurrer to the first paragraph of the complaint.

The objections to the second paragraph, urged by the appellee, are, that the facts stated do not show a valid assignment of the trade-mark to the appellant by Joseph Ingels, or that, if there was a valid assignment, she had, by non-user, abandoned her right.

It is alleged in the second, as well as in the first, paragraph of the complaint, that Joseph Ingels, by letters-patent, had secured the exclusive right to manufacture and sell the grain drills to which the trade-mark in question had been affixed for years; that, under those patents, he had been engaged in manufacturing the grain drills patented from 1863 to March, 1876, using the word "Hoosier," by affixing to his drills, as his trade-mark; that on the 17th day of January, 1877, Ingels transferred and assigned all of said letters-patent to the appellant, by an instrument in writing, duly executed by him, and also all the right to and property in said trade-mark, which said Ingels then had or owned, and the exclusive right to use said trade-mark upon grain drills.

This assignment and transfer carried with it to the assignee the exclusive right to manufacture and sell the grain drill specified in the letters-patent, and to carry on the business of making and selling the same. It was a transfer to appellant of the *right* to carry on the business in which Joseph Ingels had been engaged, and in connection with which he had used said trade-mark. As incident to the right thus transferred to the appellant, Joseph Ingels might, as he is averred to have done, assign to her his right to and property in said trade-mark. The assignment, and the right to make it, did not, in

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any way, depend upon the time at which the appellant might engage in business. Nor was it necessary to the validity of the transfer of the trade-mark that the place of business or drills actually manufactured should be transferred. It was enough if the right to engage in the business was assigned; as incident to the assignment of this right, it was quite competent to assign the right to the trade-mark.

In the case of *The Dixon Crucible Co. v. Guggenheim*, 2 Brewster, 321, it was held that the property in a trade-mark will pass by an assignment, by operation of law, to any one who takes, at the same time, the right to manufacture or sell the particular merchandise to which the trade-mark has attached. *Edleston v. Vick*, 23 Eng. L. & Eq. 51, is not unlike this case, and fully sustains the assignment. *Marsh v. Billings*, 7 Cush. 322; *Croft v. Day*, 7 Beavan, 84; *Coddington Trade-Marks*, section 122.

It appears from the complaint that the appellant purchased the right in question in February, 1877, and that this suit was commenced in February, 1880. It is alleged in the complaint that she had always intended to engage in the business as soon as she could, and that she still intends to do so. Did she only seek to recover damages, it may be that the delay would preclude her, but she asks, in this paragraph, that the appellee shall be enjoined from further use of the trade-mark. We think the delay, under the circumstances, will not preclude her from this relief. She did not intend to abandon, and therefore has not abandoned, her right, as to the future, to the exclusive use of her property in the trade-mark. Inability may prevent the use of the mark, but it will not confer upon others the right to use it, or constitute an abandonment. *Browne Trade-Marks*, sections 684, 685, and cases there cited.

In the case of *Amoskeag Manf. Co. v. Spear*, *supra*, Judge DUER says: "The consent of a manufacturer to the use or imitation of his trade-mark by another may, perhaps, be justly inferred from his knowledge and silence; but such a consent, whether expressed or implied, when purely gratuitous,

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may certainly be withdrawn, and when implied, it lasts no longer than the silence from which it springs; it is in reality no more than a revocable license."

We think the demurrer to the second paragraph should have been overruled.

It may be proper to add, that the first, second, third and fourth grounds of demurrer are not discussed by counsel, and, as we think they could not be sustained, they have not been particularly considered.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be in all things reversed, at the costs of the appellee.

No. 8676.

CHANDLER ET AL. v. CHANDLER.

PRACTICE.—*Infant.*—*Appearance.*—*Guardian ad Litem.*—*Supreme Court.*—

Where an infant is co-plaintiff with an adult, his appearance by the attorney of the adult is valid; and in such case an appeal to the Supreme Court will not be dismissed because the infant does not appear by guardian or guardian *ad litem*.

DECEDENTS' ESTATES.—*Debts.*—The personal estate of a decedent is the primary fund for the payment of his debts.

SAME.—*Heirs.*—Without administration, an action can not be maintained against the widow and heirs of a decedent, by a creditor, to recover a debt due from the decedent.

SAME.—*Vendor's Lien.*—*Pleading.*—*Judgment.*—In an action against a widow and heirs of a decedent, to enforce a vendor's lien against the real estate and heirs of a decedent, to enforce a vendor's lien against the real estate of a decedent, it is error to render a judgment directing the sale of the real estate, without first exhausting the personalty, unless the complaint avers the insufficiency of the personal property to pay the debt.

Query: Whether an action will lie, by a creditor of a decedent, against his widow and heirs alone, to enforce a vendor's lien for a debt due by the decedent on the purchase of real estate.

From the Daviess Circuit Court.

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Chandler *et al.* v. Chandler.

W. R. Gardiner and S. H. Taylor, for appellants.

W. Armstrong, for appellee.

BICKNELL, C. C.—The appellee sold and conveyed land to his son, William Chandler, and took his note for the purchase-money; the son died in possession of the land, leaving the note wholly unpaid. The appellee then brought this suit against the appellants, who are the widow and infant children of said William Chandler.

The complaint states the foregoing facts. Copies of the deed and note are annexed to the complaint and duly referred to and identified therein. The complaint further states that no letters of administration have been issued on the estate of said William Chandler, and that the note is due and unpaid. The complaint prays for the sale of the land to satisfy the debt and for all other proper relief.

The defendants were duly served with process, failed to appear and were defaulted. A guardian *ad litem* answered for the infants that they knew nothing of the allegations in the complaint, and asked the court to protect their interests.

The complaint was taken as confessed as to the widow, and the cause was submitted to the court for trial upon the complaint so taken as confessed, and the answer of the infants. The court found "for the plaintiff and due him, on the debt in his complaint mentioned, the sum of \$1,000," and rendered judgment that the same was a lien upon the land and that the said land, or so much as might be necessary, should be sold as other lands are sold on execution, to satisfy said debt and the costs of suit.

From this judgment an appeal was taken, all the defendants joining therein by their attorney. The errors are assigned by all the appellants jointly by their attorney. They are as follows:

1st. That the complaint did not state facts sufficient to constitute a cause of action.

2d. That the answer of the guardian *ad litem* put nothing in issue.

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3d and 4th. That the court erred in rendering the judgment.

5th. That the court had no jurisdiction of the subject of the action.

The appellee moves to dismiss the appeal, because it appears by the record that the two appellants Mildred Chandler and Orion Chandler are infants, not appearing here either by guardian or guardian *ad litem*. The practice act, section 11, requires that an infant, who is a sole plaintiff, shall appear by next friend; but it was always the rule that where an infant is co-plaintiff with an adult, his appearance by the attorney of the adult is valid; "if several sue jointly, and some are within age, and some of full age, and all appear by attorney, it is no error." 2 Comyn's Dig., tit. Pleader, 2 C. 1; *Foxvist v. Tremaine*, 2 Saund., Wms. ed., 212, 213 (6); *Resor v. Resor*, 9 Ind. 347. The motion to dismiss the appeal is overruled.

There is no valid objection to the answer of the infants; under such an answer for infants, it was the duty of the court to require proof of the facts alleged in the complaint; the record shows that such proof was made. Ordinarily, in a suit to enforce a vendor's lien, the complaint is sufficient without averring that the defendant has no other property subject to execution, of which any part of the debt can be made. The only effect of omitting that averment is that the plaintiff will not be entitled to a decree for a sale of the land in the first instance, to satisfy his debt; his decree, in such a case, will be for the sale of the land to satisfy his debt, in the event only that no other property of the defendant can be found subject to sale on execution. *McCauley v. Holtz*, 62 Ind. 205; *Stevens v. Hurt*, 17 Ind. 141; *Scott v. Crawford*, 12 Ind. 410; *Bowen v. Fisher*, 14 Ind. 104; *Martin v. Cauble*, 72 Ind. 67. Where, as in the present case, the widow and heirs of the vendee are defendants, peculiar considerations are involved. The rights of a widow, who takes by descent, are created by sections 27 and 31 of the decedents' act; the liability of heirs is regulated by sections 62 and 178 of the de-

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cedents' act; and the personal estate of the decedent is the primary fund for the payment of his debts.

An action can not be maintained by a creditor of a decedent's estate against the widow and heirs of such decedent, to recover any of his ordinary debts. *North-Western Conference of Universalists v. Myers*, 36 Ind. 375; *Leonard v. Blair*, 59 Ind. 510; *Carr v. Huette*, 73 Ind. 378. Under these authorities, an action could not be maintained by the appellee against the appellants, to recover the debt due by the decedent, and it may be questionable whether a creditor, not entitled to an action against a widow and heirs, to recover the debt of a decedent, is entitled, as against them alone, to enforce the equitable security of a vendor's lien against the decedent for that debt.

However that may be, the judgment in this case was erroneous, because the complaint contains no averment of insufficiency of the personal property of the decedent.

It was held in *Martin v. Cauble*, *supra*, that while it is not necessary, under the code, to show that the personal remedy is exhausted, yet a judgment or decree directing the sale of the land in the first instance is erroneous, unless it appears from the record that there was no personal property with which the debt might be paid.

The judgment of the court below ought to be reversed, and the cause remanded with instructions to permit the appellants to appear and defend the action.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and it is hereby, in all things reversed, at the costs of the appellee, and this cause is remanded, with instructions to the court below to permit the appellants to appear and defend the action, and to permit the appellee to amend his complaint.

Brown *et al.* v. Eagle Creek and Little White Lick Gravel Road Co. *et al.*

No. 7863.

BROWN ET AL. v. EAGLE CREEK AND LITTLE WHITE LICK
GRAVEL ROAD COMPANY ET AL.

CONSTITUTIONAL LAW.—*Gravel Road Assessments.*—The act of March 2d, 1877, authorizing and validating gravel road assessments (Acts 1877, Reg. Sess., p. 72), is constitutional.

From the Hendricks Circuit Court.

J. V. Hadley and — *Parker*, for appellants.

L. M. Campbell, for appellees.

Howk, J.—This was a suit by the appellants against the appellees, the said gravel road company and the auditor and treasurer of Hendricks county, to perpetually enjoin the collection of certain assessments of benefits in aid of the construction of said company's road. The appellees' demurrer to the appellants' complaint, for the alleged insufficiency of the facts therein to constitute a cause of action, was sustained by the court; and, the appellants refusing to amend, judgment was rendered against them for appellees' costs.

From this judgment the appellants have appealed to this court, and have here assigned, as error, the sustaining of the demurrer to their complaint.

It is conceded by the appellants' counsel, in argument, that the only question presented for the decision of this court, by the record of this cause and the error assigned thereon, is the constitutionality of the act of March 2d, 1877, Acts 1877, Reg. Sess., p. 72, to repeal parts of the act of March 13th, 1875, repealing the act of May 14th, 1869, authorizing the assessment of lands for plank, macadamized and gravel road purposes, and reviving the said act of May 14th, 1869, and validating the assessments made thereunder, in certain cases, and providing for the collection and application thereof.

The appellants' counsel claim that the act in question is unconstitutional and void, and they have supported their position in an able and elaborate argument. But we can not re-

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gard the question as an open one, as this court has repeatedly recognized the constitutionality and validity of the act under consideration. *The State v. Stout*, 61 Ind. 143; *The Marion, etc., Gravel Road Co. v. McClure*, 66 Ind. 468; *Cook v. Fusion*, 66 Ind. 521.

In our opinion, the act is not in conflict with any of the provisions of the constitution, and, therefore, the demurrer to the complaint was correctly sustained.

The judgment is affirmed, at the appellants' costs.

No. 7958.

RICHARDSON v. THE EAGLE MACHINE WORKS.

MASTER AND SERVANT.—Contract.—Rescission.—Where a servant, hired for a definite period, is wrongfully discharged before the time expires, he may treat the contract as continuing on his part, and recover damages for its breach by the discharge, or he may rescind and recover only for wages actually earned.

SAME.—Former Adjudication.—Where, in such case, the servant treats the contract as continuing, and by suit recovers an amount equal to the stipulated wages until the commencement of the suit, the judgment bars a subsequent suit for damages for breach of the contract, or for further wages.

From the Marion Superior Court.

C. P. Jacobs, for appellant.

A. C. Harris, for appellee.

NIBLACK, J.—Suit by George O. Richardson against the Eagle Machine Works.

The complaint stated that, on the 1st day of February, 1876, the defendant employed the plaintiff as travelling salesman and agent for the term of one year, and agreed to pay him \$125 per month, or \$1,500 per annum; that the plaintiff entered upon such employment and continued in the service of

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the defendant until the 31st day of October, 1876, at which time the defendant, without proper cause, discharged him from its service and refused to pay him his proper wages from and after that date; that afterward, on the 20th day of December, 1876, the plaintiff, having endeavored and failed to obtain employment elsewhere, brought an action against the defendant for the sum of \$192 for the unpaid balance of his salary up to the 31st day of October, 1876, and for the further sum of \$250 for wages due the plaintiff for the month of November and for a part of December, in the year 1876, the time which had elapsed after his discharge as above stated; that in that action the defendant claimed that the plaintiff was not employed by the year, but that under the contract of employment it had the right to dismiss and discharge him at the end of any month, and that it did, in the exercise of that right, accordingly discharge him from its service on said 31st day of October, 1876; that the question as to the terms of said contract was properly put in issue by the pleadings in that action, and the jury which tried the cause found all the issues in favor of the plaintiff; that the jury were so limited by the instructions of the court that they did not allow the plaintiff his salary later than the 20th day of December, 1876, the day on which that action was commenced; that after the 20th day of December, 1876, and up to the 1st day of February, 1877, the plaintiff endeavored to obtain employment elsewhere but wholly failed, being compelled to remain idle during that entire period of time; that he was ready and willing during all that time to serve the defendant under his said contract of employment, but the defendant refused to accept his services or to pay him for the time he was so compelled to remain idle by reason of its misconduct in discharging him from its service, for which he was entitled to compensation at the rate of \$125 per month; that the plaintiff expended the sum of \$50 in endeavoring to obtain employment elsewhere than with the defendant. Wherefore the plaintiff demanded damages in the sum of \$217, and general relief.

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A demurrer to the complaint was overruled, and upon a trial at special term there was a verdict and judgment for the plaintiff. Upon an appeal to the general term, the complaint was held to be insufficient and the judgment at special term reversed.

Error is assigned here upon the proceedings at general term.

Considerable uncertainty existed at one time as to the proper remedy upon the breach of a simple contract for labor for a specified time, or in some specific undertaking. But we think it may be safely inferred from the recently decided cases, that, where a servant has been wrongfully discharged before the conclusion of his term, he may, in addition to his right to recover for wages already earned, treat the contract of hiring as continuing on his part, and sue for damages for the breach by the master, or he may rescind the contract and recover the value of his services actually rendered.

It was formerly held, that where, in such a case, the servant treated the contract as continuing in force, he might recover what was denominated constructive wages for the remainder of his term; but what might then have been denominated constructive wages is now included under the general head of damages resulting from the master's breach of the contract of employment. *Ricks v. Yates*, 5 Ind. 115; *Moody v. Leverich*, 4 Daly, 401; *Gandell v. Pontigny*, 4 Campbell, 374.

The amount sued for and recovered in the former action as wages for November and a part of December, 1876, was, therefore, in legal contemplation, damages, and not in any proper sense wages.

The plaintiff having brought and prosecuted to final judgment one action for the defendant's breach of the contract sued on in this case, his remedy for that breach is exhausted. A party is not permitted to split up his cause of action and bring two suits for the same breach of a contract, where, as in this case, full damages might have been demanded and recovered in the first action. *Crosby v. Jeroloman*, 37 Ind. 264.

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The court below in general term consequently committed no error in reversing the judgment at special term.

The judgment is affirmed, with costs.

Opinion filed at May term, 1881.

Petition for a rehearing overruled at November term, 1881.

No. 7924.

SHIELDS v. SMITH ET AL.

RECOGNIZANCE.—Pleading.—Special Bail.—In a suit on a recognizance of special bail against the sureties, joining also the principal debtor as a defendant, the complaint averred sufficient to make it good against the sureties, and also that the principal had placed in the hands of the sureties a sum of money named, to secure them.

Held, that a demurrer by the principal debtor should have been sustained.

SAME.—Answer.—An answer in such case by special bail, that after judgment against S., principal debtor, they surrendered his body "in execution; that by virtue of said execution the sheriff of M. county imprisoned said S. in the jail of said county, in said cause, until he was discharged by due process of law, and by the judge of the M. Circuit Court," though awkwardly drawn, is good on demurrer.

SAME.—Surrender.—Release.—An answer by the sureties in such case, that they offered to surrender the body of the principal debtor, and that the plaintiff requested them not to do so, and agreed to release them from the recognizance if they would not make the surrender, is good on demurrer.

SPECIAL BAIL.—Liability.—Discharge.—Evidence.—Special bail is not subject to liability, where the principal debtor, having been surrendered, is discharged by due process of law; and a record of proceedings in *habeas corpus*, showing such discharge, is proper evidence of the discharge, and can not be impeached collaterally.

SAME.—Instructions.—In a suit upon a recognizance of special bail, an instruction to the jury declaring correctly the legal effect of the recognizance, is proper.

SAME.—Harmless Error.—An instruction in such case, that after judgment the body of the principal debtor might have been taken in execu-

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tion and committed to jail for a period of ten or fifteen days, though erroneous (R. S. 1881, section 865), is harmless to the plaintiff.

From the Monroe Circuit Court.

J. W. Buskirk and *H. C. Duncan*, for appellant.

J. H. Loudon and *R. W. Miers*, for appellees.

ELLIOTT, C. J.—Appellant was the plaintiff below, and in his complaint alleges that he filed a complaint against the appellee Smith, in an action for the recovery of \$144.03; that summons was issued and served; that with his complaint he filed an affidavit and bond and obtained an order for the arrest of said Smith; that the arrest was duly made, and that the appellees became bail for Smith, and their undertaking was entered upon the back of the writ; that the action was afterwards tried and a judgment rendered in appellant's favor against Smith; that the judgment directed an execution against the body of Smith; that the judgment was not paid nor the body surrendered. It is also alleged that Smith had at the time of his arrest two hundred dollars, and that he gave one hundred and fifty dollars of this sum to Carr and McLaughlin, to secure them against loss on their recognizance of special bail entered for him.

The complaint does not state a cause of action against Smith. The fact that he had money when arrested, and that he gave part of it to his bail to secure them against loss, does not render him liable upon the recognizance of special bail. Upon such an undertaking as that sued on, the recognizers, and nobody else, are liable. The complaint is founded upon the recognizance, and not upon any contract between the appellees themselves. In the transaction between the appellees the appellant had no interest. He was neither a party nor a privy. No rights of his were invaded. Smith's demurrer was properly sustained.

The second paragraph of the answer of Carr and McLaughlin is, omitting the merely formal parts, as follows: "The defendants admit the execution of the recognizance of special

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bail, but say that at the proper time, at the next term of the Monroe Circuit Court, the defendant George Smith appeared to the action in which said recognizance was executed, and contested the same, and, after judgment therein against him, said defendants surrendered the body of said George Smith in execution; that, by virtue of said execution, the sheriff of Monroe county imprisoned said Smith in the jail of said county, in said cause, until he was discharged by due process of law, and by order of the judge of the Monroe Circuit Court."

One of the objections urged against this answer is, that it does not show the surrender of the body of Smith on the execution issued in appellant's action. We think it does. Some of the clauses of the answer are awkwardly placed; as, for instance, the words, "in said cause," but still there is enough to show a compliance with the condition of the recognizance. It is a good defence to an action upon a special recognizance of bail to show that the body of the person, for whom the bail was entered, was surrendered to the proper officer, upon the writ issued in the action wherein the recognizance was executed.

Another objection stated to this answer is, that it does not show that the recognizers were exonerated by the discharge of Smith. We do not understand the law to require that they must show that the principal remained in prison until discharged by judicial sentence or operation of law. The recognizance is general in form. It reads thus: "We, R. W. Carr and C. D. McLaughlin, acknowledge ourselves special bail for the within named George Smith, in the action specified in the within order of arrest." Such force and meaning as it has the statute gives. The statute is as follows: "Any such recognizance of special bail shall only amount to an undertaking that the defendant will surrender his body, or the money, property and effects, or the value thereof, held or owned by him at the time of making such affidavit, and in default of such surrender the surety in such

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recognizance shall only be liable for the amount of the property, moneys and effects which the plaintiff may show the defendant to have held or owned at the time of making such affidavit, exceeding the amount exempt from execution." The answer shows the surrender of Smith's body, and, showing this, meets and overthrows the allegations of the complaint charging a breach of the recognizance. Courts can not stretch the effect of a recognizance beyond the limit expressly placed upon it by statute. Sureties are never held beyond the terms of their contract, and this statute clearly and explicitly limits and defines the terms and conditions of such contracts as that under examination.

The third paragraph of the answer avers that the appellees Carr and McLaughlin offered to surrender the body of their principal; that the appellant requested and directed them not to do so, and agreed with them that, if they would not surrender Smith's body, he, appellant, would release them from their undertaking. We regard this answer as sufficient. The appellant has no just reason to complain of that which was done at his own request. He can not escape the consequences flowing from a state of affairs which he himself caused to exist; *volenti non fit injuria*.

It is complained that the court erred in admitting in evidence the record of the proceedings upon a petition for *habeas corpus* filed by Smith, and upon which he was discharged. It may not have been necessary for the appellees to have introduced this evidence; if so, its introduction could have done the appellant no harm. The evidence was, however, not incompetent. Where the principal is discharged by due process of law, there is no liability at all upon the part of his bail. *White v. Guest*, 6 Blackf. 228; 2 R. S. 1876, p. 86, sec. 117. The judgment in the *habeas corpus* case declares that the principal was never liable to arrest. Whether this judgment was right or wrong can not be here determined. Until set aside in some legal manner, it is conclusive. It is useless for counsel to argue that a judgment can, in such a case as this, be

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collaterally impeached for errors committed upon the trial. The rule forbidding it is rudimental.

The first instruction given by the court states the legal effect of the recognizance sued on as follows: "That is, they," the appellees Carr and McLaughlin, "became Smith's surety that he would surrender his body or the money or the property or the value thereof held or owned by him, said Smith, at the date of the affidavit on which the order of arrest was had, or, in default of this surrender, they would pay the value of such property in money, which the plaintiff in that action might show defendant Smith held or owned at the date of such affidavit, exempt from execution."

The legal effect ascribed to the appellees' undertaking by this instruction is that fixed upon it by statute. No relevant instruction can be faulty which gives to a contract the construction which a positive statute declares it shall have. Especially is this so in cases where, without the statute, the contract would not be full enough to create any liability at all.

In one of the clauses of the second instruction the jury were told, in substance, that after final judgment the body of the debtor may be taken in execution and committed to jail for a period of ten or fifteen days. The court was mistaken as to the time for which the debtor may be imprisoned, for the statute provides that the debtor shall be held for such time as the court may direct, not exceeding ten days. 2 R. S. 1876, p. 86, section 112. The error was, however, a harmless one. It could not have possibly injured the appellant. Judgments are not reversed for harmless errors.

The questions presented upon the other instructions are the same in principle as those discussed and decided upon the pleadings.

There is no error in the record warranting a reversal.
Judgment affirmed.

 Keiser v. The State.

No. 9936.

KEISER v. THE STATE.

LIQUOR LAW.—License.—Date.—A license to sell intoxicating liquor, under the law of March 17th, 1875, should bear date of the day when issued, takes effect from that date, and does not relate back to the order of the board of commissioners granting the license, though so dated, so as to legalize sales made between the date of the order and the issuing of the license. *Vannoy v. The State*, 64 Ind. 447, and *The State v. Wilcox*, 66 Ind. 557, overruled.

SAME.—Bond.—The license can not lawfully issue until the licensee has given the bond required by law, and such bond does not cover transactions which occurred before its execution.

SAME.—Statutes.—Repeal.—The 12th section of the liquor law of 1875 is not repealed by section 249 of the act of 1881 concerning public offences.

SAME.—Criminal Law.—Information and Affidavit.—Name of Accused.—Practice.—Amendment.—An affidavit and information, in a prosecution for selling intoxicating liquor without license, must name or in some way designate the accused, and, if the information omits the name, it should, on motion, be quashed. In the lower court the information might have been amended to conform to the affidavit, but, over a motion to quash, it will not be regarded as amended on appeal.

From the Henry Circuit Court.

D. W. Chambers and — *Hedges*, for appellant.

D. P. Baldwin, Attorney General, *L. P. Newby*, Prosecuting Attorney, *W. W. Thornton* and *J. M. Brown*, for the State.

WOODS, J.—The appellant was convicted and adjudged to pay a fine of \$20 for selling intoxicating liquor, in a quantity less than a quart, without a license so to do. The principal question in the case, which is presented in different ways, is, whether, in law and in fact, the appellant had a license at the time of the sale. This appeal might be disposed of without looking beyond the information, which must be held bad; but the question stated, as well as another question which we pass upon, besides being of general importance, will necessarily be involved in another trial, if the information shall be amended, as it may be; and we therefore deem it best to decide them now. There is no dispute concerning the facts, which are substantially as follows:

78	430
150	259
78	430
157	375

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On the 22d of September, 1881, upon consideration of the petition of the appellant, the board of commissioners of the county found that he was a suitable person to receive a license, and ordered, "that in case he complies with the statute in this and like cases made and provided, and files with the auditor the treasurer's receipt for the sum of \$100, then the auditor shall issue, in the name of the board of commissioners of the county of Henry, and the State of Indiana, a license to the said John N. Keiser to sell intoxicating liquor as prayed for in the petition in this behalf."

The petition and proof of notice were not put in evidence.

On the 24th day of November, 1881, the appellant filed with the auditor the treasurer's receipt, and also a bond, and the auditor, having indorsed his approval thereon, on the same day made out and signed a license, which the defendant left with the auditor, and which, after this prosecution had been commenced, was delivered to his attorney for the appellant's use. The license was put in evidence. It reads: "This certifies that license has been granted by the board of commissioners of Henry county, State of Indiana, to John N. Keiser, for one year from the 22d day of September, 1881, to sell spirituous, vinous and malt liquors, in a less quantity than a quart at a time, with the privilege of allowing the same to be drank upon the premises," etc.

The bond given by the appellant bears date November 24th, 1881, and is in the usual form, the condition reading, "Now therefore, if the said John N. Keiser shall keep an orderly and peaceable house, and shall pay all fines and costs or damages, and pay all judgments for civil damages growing out of unlawful sales, that may be assessed against him for any violation of the provisions of said act, then," etc.

The sale for which the appellant was convicted was made after the date of the order of the board of commissioners, and before the payment by the appellant of the license fee to the treasurer, and the giving and approval of the bond, and the

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issuing of the license. The affidavit, on which the prosecution is based, was made on the 23d day of November, 1881.

The statutory provisions relevant to the granting of license are found in the act of March 17th, 1875. 1 R. S. 1876, page 869. The 1st section of this act declares it unlawful to sell intoxicating liquors in a quantity less than a quart at a time, "without first procuring * * a license as hereinafter provided." The 3d section prescribes the notice which the applicant shall give of his petition. The 4th section provides that the board "shall grant a license to such applicant upon his giving bond to the State of Indiana, with at least two freehold sureties, resident within said county, to be approved by the county auditor, * * conditioned that he will keep an orderly and peaceable house, and that he will pay all fines and costs that may be assessed against him for any violations of the provisions of this act, and for the payment of all judgments for civil damages growing out of unlawful sales, as provided for in this act, which bond shall be filed with the auditor of said county: * * *Provided*, That no appeal taken by any person from the order of the board granting such license shall operate to estop the person receiving such license from selling intoxicating liquor thereunder, until the close of the next term of the court in which such appeal is pending, at which such cause might be lawfully tried. And he shall not be liable as a seller without license for sales made during the pendency of such appeal," etc.

"Sec. 7. Upon the execution of the bond as required in the fourth section of this act and the presentation of the order of the board of commissioners, granting him license, and the county treasurer's receipt, * * * the county auditor shall issue a license to the applicant for the sale of such liquors, as he applied for, * * * which license shall specify the name of the applicant, the place of sale, and the period of time for which such license is granted.

"Sec. 8. No license, as herein provided, shall be granted for a greater or less time than one year.

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"Sec. 12. Any person not being licensed according to the provisions of this act, who shall sell or barter, directly or indirectly, any spirituous, vinous or malt liquors in a less quantity than a quart at a time, * * * shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than twenty nor more than one hundred dollars, to which the court or jury trying the cause may add imprisonment, in the county jail, of not less than thirty days nor more than six months."

Upon the question involved the cases in this State are not in harmony. The earlier cases support the ruling of the circuit court. *Wiles v. The State*, 33 Ind. 206; *Schliet v. The State*, 31 Ind. 246; *Houser v. The State*, 18 Ind. 106. *Contra*, *Vannoy v. The State*, 64 Ind. 447; *The State v. Wilcox*, 66 Ind. 557; *Kelley v. The State*, 69 Ind. 418.

The authorities elsewhere seem to be in accord with the earlier cases here. *Bolduc v. Randall*, 107 Mass. 121; *The State v. Hughes*, 24 Mo. 147; *Edwards v. The State*, 22 Ark. 253; *Brown v. The State*, 27 Tex. 335; *Lawrence v. Gracy*, 11 Johns. 179. See note to *The State v. Wilcox*, *supra*, 9 Cent. L. Jour. 408.

The Texas court, in the case cited, says: "The law provides that no person or firm shall sell spirituous, vinous, or other intoxicating liquors, in quantities less than one quart, without first having obtained license therefor, in the manner prescribed by the act of February 2d, 1856. The order of the county court to the clerk thereof to issue a license to the applicant, does not, of itself, authorize the applicant to retail liquors, but only authorizes the issuance of a license to do so, after the applicant shall have complied with all the pre-requisites of the law. In this case, the clerk of the county court ought to have made the license prospective. After the applicant had produced to the clerk of the county court the county treasurer's receipt for the amount of money paid by the applicant, the license ought then to have been granted, to take effect

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from that time, and not from the time when the county court acted upon the application. Any other practice would enable the applicant, who had taken the preliminary steps in the county court to obtain license, to take the chances of violating the law with impunity, reserving to himself the means of defending himself successfully against a prosecution, if it became apparent that one was about to be instituted."

In the Arkansas case it is held, under a statute forbidding sales by retail without license, that "though jurisdiction is conferred on the county court to grant a license, in such cases, to operate prospectively, yet it has no jurisdiction or power to make the license operate retrospectively; or in other words, to cure a past offence, or legalize a crime."

The Supreme Court of Missouri, upon a state of facts essentially the same as those disclosed in this record, said: "The order is not the license; and when the license is obtained and dated, it looks forward, not backward. It can not have relation back so as to cover the intermediate space. The order for a license would not protect him, if he sold liquors (intoxicating) before he thought proper to obtain his license; if so, he would not trouble himself to get a license. But it is the license to sell that gives the seller the protection under the law, and this court can not sanction the doctrine of relation back in such cases. The clerk of the county court very properly dated his license when it was issued; he referred to the previous order of the county court, thereby showing his authority to issue the license—not that the license was to have operation and vitality so long before it was in being."

The Massachusetts case is perhaps not fully in point, but nevertheless affords support to the doctrine of the other cases.

Lawrence v. Gracy, supra, was an action to recover a penalty under a statute, for retailing spirituous liquors without license. The defendant showed that he had paid the license fee and had a parol license. The statute, however, prescribed a written license, and the court held that none other would do.

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The authorities, almost without exception, seem to concur in requiring, in respect to the obtaining of the required license, a strict compliance with the law. See, besides cases already cited, *Kadgihn v. City of Bloomington*, 58 Ill. 229; *Spake v. People*, 89 Ill. 617; *Commonwealth v. Blackington*, 24 Pick. 352; *State v. Shaw*, 32 Me. 570; *McWilliams v. Phillips*, 51 Miss. 196; *Commissioners, etc., v. Robinson*, 16 Minn. 381; *The State v. Terry*, 35 Texas, 366; *State v. Fisher*, 33 Wis. 154.

In the case of *City Council of Charleston v. Corleis*, 2 Bailey (S. C.) 186, it was held that a license from the city to retail spirituous liquors from a day *past* was a release of the penalties for retailing without license subsequent to that day and before the taking out of the license. But it seems, in that case, that there was an ordinance authorizing the city council to grant licenses at any time, but declaring expressly that they should "relate back to the regular semi-annual periods of April and October." The case can not, therefore, be said to be at variance with the general current of decisions on the subject.

In *Wiles v. The State*, 33 Ind. 206, the holding of this court was expressed in the following language: "The order of the county board is not the license, nor does it alone confer the power to retail. It is but one of the preliminary steps in procuring the license. The order may be made, but the applicant may refuse to pay the fee or execute the bond, without which he is not entitled to the license. It is the license itself, properly procured, that confers the right to retail under the statute, and until it is issued no such right is conferred. *Schlict v. The State*, 31 Ind. 246. It is made a penal offence to sell intoxicating liquors by a less quantity than a quart at a time, or to sell in any quantity to be drunk or suffered to be drunk in the vender's house, out-house, etc., without such license, and it is not in the power of the county board or the auditor to grant a license extending back to a prior date, so as to cover offences already committed. The license can only take effect from the date it is issued."

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This seems to be the true and consistent doctrine, and, notwithstanding the later cases, we deem it best to return to it.

It may be observed, with reference to the facts of the case before us, that the bond which the appellant gave was entirely prospective in its terms, as, indeed, the statute seems clearly to contemplate that it should be, and it would hardly be contended that his bondsmen were made liable by that instrument to pay fines and costs or civil damages, which might be adjudged against the appellant on account of anything done before the bond was made, though done after the order of the board for the granting of the license. The law plainly requires that the licensed seller of intoxicating liquors shall be under bond, with sureties, conditioned as prescribed in the statute. He can not be under license unless at the same time under bond. The appellant, at the time of the sale in question, had not given bond and had no license, and though it should be held that, under some circumstances, the license might relate back, it can not be held in this case, for the reason, if no other, that the appellant had given no bond at the time of the sale on which the prosecution is based.

The next question arises upon the giving and refusing of instructions. The appellant asked the court to charge that the punishment which might be inflicted, if he was found guilty, was a fine of not less than \$5 nor more than \$200. The court refused this, and instructed according to the 12th section of the act of March 17th, 1875, which, as we have seen, fixes the minimum of punishment at \$20.

It is claimed by the appellant that section 12 of that act is impliedly repealed by section 249 of the act of 1881, concerning public offences, which section reads thus: "Whoever, by himself or agent, transacts any business or does any act without a license therefor, when such license is required by any law of this State, shall be fined not more than \$200 nor less than \$5."

In the case of *Sanders v. The State*, 77 Ind. 227, it was contended, on other grounds, that section 12 had been repealed,

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and that the right to prosecute for offences committed against its provisions while in force had not been saved. We held otherwise, and, in the opinion, suggested that if there had been a repeal of the section, it was by implication from section 249 aforesaid. But it is a well settled rule that repeals by implication are not favored; and general provisions, such as section 249, will not be construed as superseding a prior special provision in reference to a particular subject. Section 249 is to be construed as applying to any transaction, business or trade, for which the law requires a license, without providing a special penalty for failing to obtain it. The sections under consideration may well stand together; there is no necessary conflict between them, and the one therefore does not repeal the other. Sedgwick Statutory and Constitutional Law, 97-107; Potter's Dwarries Statutes, 154-158 and notes. Said 12th section appears in the R. S. 1881, as section 5320.

The further point is made and must be sustained, that the information is insufficient, because it does not show that the appellant committed the alleged offence. So much of the information, as is necessary to present the question, is of the tenor following, to wit:

"STATE OF INDIANA.	}	HENRY CIRCUIT COURT,
		Nov. Term, 1881.

"L. P. Newby, prosecuting attorney," etc., "informs the Circuit Court of Henry county, and State of Indiana, that on or about the 15th day of November, 1881, at said county of Henry, and State of Indiana, did then and there unlawfully sell," etc., "he, the said John N. Keiser, not then and there being licensed."

It will be observed that the name of the one accused of committing the offence is omitted. Counsel for the State insist that the affidavit and information must be considered together, that the latter was amendable by the former, and that "this court must presume that it was amended." We can

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not indulge presumptions inconsistent with the record; neither can we treat the case as if the amendment had been made. The criminal code, Revision of 1881, section 1756, provides that no indictment or information shall be deemed invalid, set aside or quashed, among other reasons, "*Sixth*. For any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged." The plain implication from this, and from general principles as well, is, that if an information fails to name or otherwise distinctly indicate the person charged, it must be held bad on appeal, after a motion to quash has been overruled. The court below might doubtless have permitted an amendment, to conform the information to the affidavit, but this not having been done, the judgment must be reversed. There must be a good information as well as a good affidavit.

The judgment of the circuit court is therefore reversed, and the case remanded with instructions to sustain the motion to quash the information.

WORDEN and HOWK, JJ.—We concur with the court in holding that the information in this case was insufficient, and that section 12 of the act of March 17th, 1875, regulating and licensing the sale of intoxicating liquors, is still in full force. But we can not concur in the views expressed in the opinion of WOODS, J., speaking for the majority of the court, in reference to the operation and effect of the appellant's license, or to the time when such license ought to have been dated. Upon these points, we adhere to the views expressed in *Vannoy v. The State*, 64 Ind. 447, and *The State v. Wilcox*, 66 Ind. 557.

 Evans, Adm'r, et al. v. Pence.

No. 7939.

EVANS, ADM'R, ET AL. v. PENCE.

78	439
129	367
78	439
133	361

MORTGAGE.—Foreclosure.—Decedents' Estates.—Heirs.—Consideration.—Pre-existing Debt.—Insolvency.—In an action against the heirs and administrator of a deceased mortgagor, to foreclose mortgages, answers that the mortgages were given to secure pre-existing debts, there being no new consideration therefor, and that the decedent's estate was insolvent, contain no defence.

SAME.—Existing Indebtedness.—Privity.—An existing indebtedness is a sufficient consideration to support a mortgage as between mortgagor and mortgagee. If obligatory upon the mortgagor in his lifetime, the mortgage is valid against those in privity with him by representation.

SAME.—Insolvency of Estate.—Preferred Debts.—Mortgages of a decedent were not invalidated by the insolvency of his estate; but under sections 108 and 109, 2 R. S. 1876, p. 534, were preferred debts as to the personalty.

SAME.—Recording.—That a mortgage was not recorded within the time prescribed by statute, is not a defence that can be made by the administrator and heirs of the deceased mortgagor.

From the Warren Circuit Court.

J. McCabe, for appellants.

J. M. Rabb, for appellee.

NEWCOMB, C.—This was an action by the appellee against the heirs and administrator of George Pence, deceased, to foreclose two mortgages executed by said George in his lifetime to the appellee. Both mortgages were upon the same tract of land, but were given at different dates. The first was to secure six promissory notes of said George, payable to the appellee, all of which were past due when the mortgage was executed. The second mortgage was to secure six additional notes, and also the notes mentioned in the first mortgage. Each mortgage contained a promise to pay the several notes secured thereby.

The administrator answered that the mortgages were given and executed without any consideration whatever; that the estate of George Pence was insolvent, and that to pay his debts it would be necessary to reduce all of said real estate to

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not indulge presumptions inconsistent with the record; neither can we treat the case as if the amendment had been made. The criminal code, Revision of 1881, section 1756, provides that no indictment or information shall be deemed invalid, set aside or quashed, among other reasons, "*Sixth*. For any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged." The plain implication from this, and from general principles as well, is, that if an information fails to name or otherwise distinctly indicate the person charged, it must be held bad on appeal, after a motion to quash has been overruled. The court below might doubtless have permitted an amendment, to conform the information to the affidavit, but this not having been done, the judgment must be reversed. There must be a good information as well as a good affidavit.

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 Evans, Adm'r, et al. v. Pence.

No. 7939.

EVANS, ADM'R, ET AL. v. PENCE.

78	439
129	507
78	439
129	507

MORTGAGE.—Foreclosure.—Decedents' Estates.—Heirs.—Consideration.—Pre-existing Debt.—Insolvency.—In an action against the heirs and administrator of a deceased mortgagor, to foreclose mortgages, answers that the mortgages were given to secure pre-existing debts, there being no new consideration therefor, and that the decedent's estate was insolvent, contain no defence.

SAME.—Existing Indebtedness.—Privity.—An existing indebtedness is a sufficient consideration to support a mortgage as between mortgagor and mortgagee. If obligatory upon the mortgagor in his lifetime, the mortgage is valid against those in privity with him by representation.

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J. McCabe, for appellants.

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The administrator answered that the mortgages were given and executed without any consideration whatever; that the estate of George Pence was insolvent, and that to pay his debts it would be necessary to reduce all of said real estate to

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assets for that purpose. Also that the mortgages were not recorded within forty-five days after their execution, nor until after the death of said mortgagor.

The record does not show that any reply was filed to these answers, but, as the parties proceeded to trial upon them, they are to be deemed controverted as though a formal denial had been filed.

The cause was tried by the court, which found for the plaintiff, and rendered judgment of foreclosure accordingly, over a motion by the defendants for a new trial.

Two facts present the only questions discussed by the appellants, viz.:

1. That the mortgages were given to secure pre-existing debts, there being no new consideration therefor.
2. That the estate of George Pence was insolvent.

On these grounds the appellants ask for a reversal of the judgment.

Their argument against the validity of the mortgages is based on the doctrine asserted in *Busenbarke v. Ramey*, 53 Ind. 499, *Gilchrist v. Gough*, 63 Ind. 576, and other like cases, to the effect that one who takes a mortgage or collaterals to secure an antecedent debt, is not a purchaser for value as that term is used in the law, and that he takes such security subject to all outstanding equities, and to the equities of subsequent *bona fide* purchasers or encumbrancers, without notice.

But this rule is for the protection of the rights of third persons. As between debtor and creditor, it does not invalidate securities executed by the former. The existing indebtedness is a sufficient consideration to support the mortgage as between mortgagor and mortgagee. *Jones Mortgages*, sec. 611; *Cooley v. Hobart*, 8 Iowa, 359; *Usina v. Wilder*, 58 Ga. 178; *Moore v. Fuller*, 6 Oregon, 272; *Jewett v. Warren*, 12 Mass. 300.

It was held by this court in *Work v. Brayton*, 5 Ind. 396, *Nutter v. Harris*, 9 Ind. 88, *Wright v. Bundy*, 11 Ind. 398,

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McMahan v. Morrison, 16 Ind. 172, and *Babcock v. Jordan*, 24 Ind. 14, that a precedent debt constitutes a valid consideration for a conveyance or mortgage. The doctrine announced in those cases has been modified by the subsequent cases of *Busenbarke v. Ramey* and *Gilchrist v. Gough*, *supra*, in favor of the equities of third parties; but we do not understand these later cases to hold that a debtor may avoid a conveyance or mortgage given for an antecedent debt, or if he has endorsed notes to his creditor as collateral security for a pre-existing debt, that he may at pleasure repudiate the transaction and reclaim such collaterals. See also *Robertson v. Cauble*, 57 Ind. 420. The administrator of George Pence was in privity with him by representation, and the mortgage was valid against him and the heirs of the decedent, if obligatory upon the latter in his lifetime. The fact that the estate of the decedent was insolvent could make no difference. The statute does not invalidate mortgages for that reason; on the contrary, it makes them preferred debts as to the personalty. 2 R. S. 1876, p. 534, sections 108, 109.

Nor did the failure of the mortgagee to record her mortgages within the statutory period furnish any defence to the appellants. Such failure would avoid the mortgages only as to subsequent purchasers, lessees or mortgagees in good faith and for a valuable consideration. 1 R. S. 1876, p. 365, sec. 16.

We find no error in the proceedings of the circuit court, and its judgment should be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be, and it is hereby, in all things affirmed, at the costs of the appellants.

The American Insurance Company of Chicago v. Pressell.

No. 7117.

THE AMERICAN INSURANCE COMPANY OF CHICAGO v.
PRESSELL.*INSURANCE.—Promissory Note.—Fraud.—False Representations.—Pleading.—*

In an action by an insurance company upon a promissory note, given for premiums on insurance, an answer is good which avers false representations of existing facts affecting the responsibility of the company and its ability to fulfil its contracts, made by its agent as to matters presumed to be within his knowledge, and of which the defendant was ignorant, whereby the defendant was injured.

*SAME.—Foreign Insurance Company.—Evidence.—*A foreign insurance company furnished to the Auditor of State a statement substantially as required by statute. The copy of its charter was furnished as a separate paper, and not embraced as the fourteenth item of the statement, as section 3765, R. S. 1881, specifies. This was accepted by the auditor as sufficient. The auditor's certificate of authority and copy of statement recited that a copy of the charter was filed, and this was filed by the company's agent in the clerk's office, without a copy of the charter. *Held*, that a premium note taken for insurance made in the county was not, for this cause, void.

From the Henry Circuit Court.

M. E. Forkner and D. W. Kinsey, for appellant.

BICKNELL, C. C.—This was an action by the appellant against the appellee on a promissory note given for insurance and payable in yearly instalments. The note was to become wholly due if any of said instalments should remain due and unpaid for thirty days after notice given of the maturity thereof. The complaint averred the making of the note and contract, and that three of the instalments were not paid, whereof notice was duly given, whereby the entire note became due. A copy of the note and a copy of said notice and a copy of the appellant's charter, which was made a part of the contract, were parts of the complaint. The appellee answered in eight paragraphs, to all of which, except the sixth, seventh and eighth, demurrers were sustained; demurrers to the sixth, seventh and eighth, for insufficiency of facts,

The American Insurance Company of Chicago v. Pressell.

were overruled; to these rulings the appellant excepted, and then replied in denial of the sixth, seventh and eighth defences. The issues were tried by the court, and there was a finding for the appellee. The appellant's motion for a new trial was overruled; judgment was rendered upon the finding, and this appeal was taken.

Errors are assigned in overruling the demurrers to the sixth, seventh and eighth defences, and in overruling the motion for a new trial.

The error assigned as to the sixth defence is not alluded to in the appellant's brief, and is therefore regarded as waived.

The seventh and eighth defences were good. They averred false representations of existing facts relating to the condition and business of the insurance company, which facts affected the responsibility of the company and its ability to fulfil its contracts. *Burt v. Bowles*, 69 Ind. 1; *Reagan v. Hadley*, 57 Ind. 509. And such representations were made by the agent of the appellant of matters presumed to be within his knowledge, and of which the appellee was ignorant. *Shaeffer v. Sleade*, 7 Blackf. 178; *The State v. Holloway*, 8 Blackf. 45. And each of the defences avers an injury sustained by reason of the false representations. *Sieveling v. Litzler*, 31 Ind. 13.

There was no error in overruling the demurrers to the seventh and eighth defences.

As a cause for a new trial, it is alleged that the finding of the court is not sustained by the evidence and is contrary to law. The point is made that the statement filed by the appellant's agent in the clerk's office of Henry county, under section 1 of the act of December 21st, 1865, in relation to foreign insurance companies, 1 R. S. 1876, p. 594, did not contain a copy of the act of incorporation of the appellant's company.

It was held in *The Rising Sun Insurance Co. v. Slaughter*, 20 Ind. 520, that, under the act of June 17th, 1852, 1 G. & H. 272, a policy of insurance negotiated in this State by a foreign insurance company, or its agent, without a previous compliance with the requirements of that act, was void.

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In *Hoffman v. Banks*, 41 Ind. 1, it was held that said act of 1865 is a substitute for said act of 1852, and that a note given for a policy in a foreign company, which had not complied with said act of 1865, was void. To the same effect are the decisions in *The Union, etc., Ins. Co. v. Thomas*, 46 Ind. 44, and *Cassaday v. The American Ins. Co.*, 72 Ind. 95.

In the case at bar, it appeared in evidence that the appellant was a foreign insurance company, and had filed a statement with the Auditor of State substantially in accordance with the requirements of section 1 of said act of 1865, and had furnished the Auditor of State with a copy of its act of incorporation, but it did not appear that said act of incorporation was embraced in said statement as item fourteenth, so as to be a literal compliance with said section 1. The Auditor of State accepted the statement, with the copy of the charter, as sufficient, and issued to the agents his certificate of authority. That certificate recited the fact that a copy of the charter had been furnished to the auditor, and annexed to the certificate was a copy of the statement of the appellant. This certificate and statement were duly filed by the agents with the clerk of Henry county in his office, so that the appellant's statement appeared there, and the auditor's certificate of the agent's authority, reciting the fact that a copy of the charter had been furnished to the auditor, also appeared there, but a copy of the charter of the company was not there.

Upon this evidence the same question arises that was decided by this court in *The American Insurance Co. v. Butler*, 70 Ind. 1. There the certified copies of the statements filed with the clerk were imperfect in precisely the same way as above stated, and the court below, as in this case, had given judgment for the defendant in a suit on a note, given to the same company, for a policy of insurance negotiated by the same agents, as in this case.

This court said: "We can not adopt or approve of a construction of the provisions of the statute, * * which would punish the appellant by avoiding its contracts, for the mere

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failure or omission of the Auditor of State to furnish the appellant's agents with a certified copy of its act of incorporation, which, it appears, the appellant, had furnished to such auditor."

Upon the authority of the case just cited, the finding of the court in the case at bar was not sustained by the evidence, and was contrary to law. The judgment of the court below ought to be reversed for the error of the court in overruling the motion for a new trial.

PER CURIAM.—It is therefore ordered by the court, that the judgment of the court below be, and it is hereby, in all things reversed, at the costs of the appellee, and this cause is remanded for a new trial.

No. 8780.

MCFADIN v. DAVID.

78	445
147	606

SLANDER.—*Actionable Words.*—*Pleading.*—In an action of slander by D. against E., it was averred that A. died testate, bequeathing to B. and C., daughters of D., \$500 each, leaving E., his son, surviving him, and that E. spoke of and concerning D., and of and concerning his father's death, the following false and scandalous words: "Old lady, you gave my father four double doses of morphine on the day he made his will; you said, old man, you had better be fixing up your business; if it hadn't been for you giving morphine, your daughters would not have gotten what they did."

Held, that the words, with the proper innuendoes, are not actionable *per se*. *Held*, also, that the extrinsic circumstances averred in the complaint do not render the words actionable.

VERDICT.—*Defects not Cured.*—*Complaint.*—*Demurrer.*—A verdict will not aid defective averments in a complaint, where its sufficiency is questioned by a demurrer.

From the Posey Circuit Court.

E. M. Spencer and *W. Loudon*, for appellant.

A. P. Hovey and *G. V. Menzies*, for appellee.

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BEST, C.—This was an action of slander, and the only question in the record arises upon the action of the court in overruling a demurrer to the second paragraph of the complaint.

In this paragraph it was alleged, "that heretofore, to wit, on the 17th day of July, 1879, one Noah McFadin, the father of the said defendant, was in his last sickness and in a dying condition, and then and there made and executed his last will and testament, in which said last will and testament the said Noah McFadin bequeathed to the daughters of the plaintiff, Maggie David and Nancy David, the sum of \$500 each, and after the making of said will the said Noah McFadin departed this life testate, leaving said will in full force; and afterwards, to wit, on the 1st day of September, 1879, the said defendant spoke the following false and scandalous words of and concerning the said plaintiff, and of and concerning the said Noah McFadin, and the said last will and testament, that is to say: 'Old Lady' (the plaintiff meaning), 'you gave my father' (the said Noah McFadin meaning) 'four double doses of morphine on the day he made his will; you' (meaning the plaintiff) 'said, old man, you' (said Noah McFadin meaning) 'had better be fixing up your business. If it hadn't been for you' (the plaintiff meaning) 'giving morphine, your daughters' (the said Maggie and Nancy meaning) 'would not have gotten what they did.' Then and thereby meaning that the said plaintiff had unlawfully administered poison to the said Noah McFadin in his lifetime, which caused his death, and left to the said daughters of the plaintiff \$500 each, for which plaintiff says she is damaged in the sum of \$2,000, for which she demands judgment."

The paragraph was insufficient, and the demurrer should have been sustained.

The words spoken were not actionable *per se*. They do not, in their usual sense, either import a charge of murder or of manslaughter. They do not amount to a charge that death ensued from the administration of the morphine, or that it was administered either improperly or feloniously. Indeed, it

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does not appear that any harm resulted from its administration. It is true that it is stated by the innuendo that the defendant meant, by the language spoken, that the plaintiff had caused the death of Noah McFadin by the unlawful administration of poison, but an innuendo can not enlarge the meaning of words. If the words themselves do not warrant the signification imputed to them, an innuendo can not. Words not actionable *per se* can not be rendered so by an innuendo.

"The absence of a *colloquium*, showing by extrinsic matter that the words charged are actionable, is not supplied by an *innuendo* attributing to those words a meaning which renders them actionable." *Schurick v. Kollman*, 50 Ind. 336.

Treating the paragraph in question as unaided by the averment of extrinsic facts, the *innuendo* can not supply a meaning that the words themselves do not warrant. Taken in their usual and ordinary sense, they do not charge that the plaintiff caused the death of Noah McFadin by the administration of morphine or otherwise, and as they do not they are not actionable *per se*. Unless they constitute such charge, they impute no crime to the plaintiff.

In *Ford v. Primrose*, 5 D. & R. 287, the language was: "I think the present business ought to have the most rigid inquiry, for he (meaning the plaintiff) murdered his first wife, that is, he administered, improperly, medicines to her for a certain complaint, which was the cause of her death."

Upon a motion in arrest of judgment, ABBOTT, C. J., said: "Admitting it to be doubtful whether these words import the charge of a crime upon the plaintiff, that doubt has been removed by the verdict; for the declaration alleges that the defendant uttered these words with an intention to cause it to be believed that the plaintiff was guilty of murder or manslaughter, and if the jury were of opinion that they were uttered with that intention we can not say that the plaintiff is not entitled to a verdict. But I can not say that these words may not, in reasonable construction, import a charge of murder or manslaughter, especially after the finding of the jury."

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BAYLEY, J., said: "I take it that if a man, by the improper administration of medicines to another, cause his death, that would be manslaughter. And if he administers medicines with an intent to produce death, it would be murder. I think the words declared upon import, at least, a charge of manslaughter."

The language of these judges was addressed to words not only charging the plaintiff with causing the death of his wife, but causing it by the improper administration of medicines. In this case the words neither charge that the morphine was improperly administered or that its administration produced death.

In *Jones v. Diver*, 22 Ind. 184, the words were these: "In my opinion the bitters that Diver fixed for Smith were the cause of his death," and it was averred that the words were used in a criminal sense, intending to charge Diver with the murder of Smith, which was understood by the hearers.

The court said: "The words do not, in their usual sense, import a charge of murder; and there is no colloquium showing that they were used in a conversation about Smith as having been murdered, etc., so as to give the words a particular signification as used in the given case."

A charge that one person caused the death of another is not actionable *per se*. *Miller v. Buckdon*, 2 Bulst. 10; *Peake v. Oldham*, 1 Cowper, 275.

In the light of these authorities we think it clear that the language declared upon is not actionable *per se*.

The pleader did not, we think, regard the words actionable *per se*, as he alleged extrinsic circumstances to show their actionable quality; and the question arises whether such facts render them slanderous. We do not think they do. The only facts averred are the amount of the legacies, the time when and the condition of the testator at the time he made his will. These add nothing to the complaint, as they do not show that the words were not used in their usual and ordinary sense, and therefore they do not render the words actionable.

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The appellee, however, insists that the court, after verdict, will consider the words as used in their worst sense. This is the rule upon a motion for a new trial. *Blickenstaff v. Perrin*, 27 Ind. 527. And on a motion in arrest of judgment, or an assignment of error that the complaint does not state facts, many defective averments will be aided by a verdict, but not when the complaint is questioned by a demurrer. In such case a verdict can not aid a defective averment, nor supply a good cause of action.

Where the language is susceptible of an innocent and a criminal meaning, the court, after verdict for the plaintiff upon a motion for a new trial, in arrest, or upon an assignment of error, will adopt the latter meaning, and where the language is rendered actionable by extrinsic circumstances defectively averred, the verdict will aid them, but language not actionable *per se*, in the absence of extrinsic circumstances, will not be so regarded, even after verdict.

The demurrer was improperly overruled, and for this error the judgment should be reversed.

PER CURIAM.—It is therefore ordered upon the foregoing opinion that the judgment be, and it is hereby, in all things reversed, at the appellee's costs, with instructions to sustain the demurrer to the second paragraph of the complaint, with leave to amend, etc.

No. 8634.

LOUTHAIN v. FITZER.

78	449
154	229

REPLEVIN.—*Evidence.—Possession.*—To sustain replevin the evidence must show that the defendant was in actual or constructive possession of the property at the time of the commencement of the action.

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SAME.—Sheriff.—Execution.—Delivery Bond.—Demand.—Demurrer to Evidence.—In replevin against a sheriff evidence that the property belonged to the plaintiff, and was levied upon under an execution against his father; that the sheriff then took from the plaintiff a delivery bond and permitted the property to remain on the farm where he resided; and that afterwards the plaintiff formally demanded and was refused a return of the property to him, is sufficient on demurrer to sustain the action.

From the Cass Circuit Court.

D. C. Justice and *D. B. McConnell*, for appellant.

D. P. Baldwin and *D. D. Dykeman*, for appellee.

NIBLACK, J.—Action of replevin by Henry C. Fitzer against William P. Louthain, for the recovery of several horses, a crop of wheat in stacks, a crop of oats in shocks, and a crop of corn growing in the field.

Answer in general denial.

After a jury had been empanelled, and the evidence for the plaintiff was closed, the defendant demurred to the evidence, and the jury were discharged. The court overruled the demurrer to the evidence, adjudged the plaintiff to be the owner of the property in controversy, made an estimate of its value, and rendered a judgment for its recovery against the defendant.

Error is assigned only upon the decision of the court overruling the demurrer to the evidence.

It was made to appear by the evidence that at the time of, and previous to, the commencement of this action, the defendant was the sheriff of Cass county; that as such sheriff he had levied on the property in dispute as the property of one John Fitzer, the father of the plaintiff, upon an execution in his hands against him, the said John Fitzer; that, upon making such levy, the defendant had taken from the plaintiff a delivery bond for the property, and had thereupon permitted all the property to remain on the farm upon which the plaintiff resided; that, after his execution of the delivery bond, the plaintiff formally demanded a return of the property to him, but the defendant refused to return the same, or

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any part of it. The evidence, also, fully established the ownership of the plaintiff in the property.

The only question presented in this case is, Did the evidence show such a taking and detention of the property as were necessary to enable the plaintiff to sustain this action?

It is an elementary principle, as applicable to actions of replevin, that the defendant must have been either in the actual or constructive possession of the property at the time of the commencement of the suit. *Krug v. Herod*, 69 Ind. 78; *Morris Replevin*, 191. But what constitutes sufficient evidence of such possession?

Wells on Replevin, at section 54, says: "Proof of any unlawful taking or control of the goods of another is sufficient to sustain an allegation of taking, without proof of an actual forcible dispossession of the plaintiff."

Further on, at section 142, the same author says: "Where the defendant was an officer who had levied on property, but did not remove it, the defendant in the execution who still retained the goods, will not be permitted to sustain replevin against the officer, as the possession was still in himself; but when an officer levies on goods, and takes an inventory, and directs a receiver to prevent their removal, he has a sufficient possession to enable the owner to sustain replevin. And such a taking is sufficient ground on which to base an action against the officer."

In *Latimer v. Wheeler*, 3 Abb. App. Dec. 35, it is said that, "In an action for possession of personal property, it is not necessary to show that defendant had possession in fact when the action was brought. If he had been previously in possession, and was present at the time of a demand on, and refusal by, another person, at the place where the goods were, he can not defend on the ground that he had parted with the possession to such person. Any unlawful interference with the property of another, or exercise of dominion over it, by which the owner is damnified, is sufficient to maintain the action."

These authorities, which appear to be well supported by other decided cases, fully sustain the court below in over-

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ruling the demurrer to the evidence, and in rendering judgment upon the evidence against the defendant. *Allen v. Crary*, 10 Wendell, 349; *Fonda v. Van Horne*, 15 Wendell, 631; *Knapp v. Smith*, 27 N. Y. 277.

The judgment is affirmed, with costs.

No. 8457.

BENSON, ADM'R, v. LIGGETT.

PRINCIPAL AND AGENT.—*Ratification.—Decedents' Estates.*—A., without authority, received for B. money derived from the sale of real estate by a commissioner in partition, and notified B. of the fact; B. disputed the validity of the sale and refused to accept or have anything to do with the money; thereupon A. loaned the money to C. who was then solvent, but afterwards became insolvent, taking C.'s note, payable to B. *Held*, that A.'s administrator was liable to B. for the money so received. *Held*, also, that the bringing of the suit ratified the receipt of the money by A., but not the loaning.

SAME.—*Authority to Loan Does not Authorize Loan without Security.—Trust and Trustee.*—An agent or trustee, with authority to loan, may not loan on the unsecured obligation of the borrower, much less one who has no authority beyond what is implied from possession and the duty to keep safely.

From the Cass Circuit Court.

D. B. McConnell, for appellant.

R. Magee and *N. O. Ross*, for appellee.

WOODS, J.—The appellee filed his claim against the appellant as administrator of the estate of Mary Liggett, for money received by the deceased in trust for the appellee from John Davis, commissioner in partition for the sale of real estate in which the appellee had an interest. The appellant insists that the circuit court erred in sustaining a demurrer for want of facts to the fourth paragraph of his answer, which was in substance as follows:

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"That the decedent, while in life, as the attorney of the plaintiff, with general authority to manage the plaintiff's property in Indiana, received from John Davis, commissioner, a certain sum of money, purporting to be the share of the plaintiff in certain real estate; that, immediately upon receipt of the money, she notified the plaintiff of the fact, and that she held the money subject to his order; that the plaintiff denied the validity of the sale, and positively refused to accept the money, told her to keep it, and that he never would take it; that thereupon the decedent, having no use for the money and no safe way of keeping it, loaned it in the name of the plaintiff to one Charles B. Lasselle, taking his note therefor; that she exercised the utmost care and diligence in loaning the money, Lasselle being at the time solvent and worth a large sum of money, and the owner of a large and valuable property in Cass county, Indiana; that the plaintiff was promptly notified of the loan at the time it was made and never objected to the person to whom the loan was made, nor to the fact of the loan, but simply refused to have anything to do with the money, and before and after the filing of this claim refused to accept Lasselle's note, which the defendant brings into court for the use of the plaintiff. Wherefore," etc.

The following extract from the appellant's brief contains the substance of the argument made in his behalf:

"By now seeking to hold the estate of the decedent he has waived all right to deny the authority of his mother to take the money as his agent. By refusing to receive the money when she, having possession of it as his agent, tendered it to him, and by declaring that he would not receive it, that he had no claim upon it, when it *was* his, he absolved her from any and all duty, other than to take ordinary care of the money, and see that it was safely kept, until it could be disposed of; and by his same acts she was impliedly given license to dispose of it for him, in any way and manner that to her judgment might seem best for him."

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There can be no question that by suing for the money the appellee confirmed the act of the decedent in receiving it for him; but it does not follow that her subsequent dealing with the money has been in like manner ratified. *Knowlton v. School City of Logansport*, 75 Ind. 103.

The nature and extent of the power of attorney referred to in the answer are not so far set forth as to show that it had any application to the money in dispute, and the inference is that it did not. Upon the refusal of the appellee to receive this money of his mother, accompanied with a denial of the validity of the sale of the land, her plain course was to return the money to the commissioner, to be by him accounted for to the court in due form of law. But if, for any reason she was unable to do this, then it necessarily became her duty to keep the money safely in trust for the plaintiff, or for the purchaser at the commissioner's sale, in case the sale should be set aside and annulled. This duty she could have safely performed by depositing the money in a solvent bank in her name as trustee. *Perry on Trusts*, section 443. But she had no right whatever to loan the money on the individual note of the borrower, however responsible he seemed to be. She would have had no right to make such a disposition of the money if it had been expressly entrusted to her by the plaintiff for the purpose of being loaned, much less having no authority beyond possession and the duty to keep safely.

In *Perry on Trusts*, section 453, it is said: "There is one rule that is universally applicable to investments by trustees, and that rule is, that trustees can not invest trust moneys in personal securities. If trustees have a discretion as to the kind of investments, it is not a sound discretion to invest in personal securities." See *Gilbert v. Welsh*, 75 Ind. 557.

Judgment affirmed, with costs.

Webb v. Carr, Trustee.

No. 7941.

WEBB v. CARR, TRUSTEE.

HIGHWAY.—*Gateway.*—*Act of 1852.*—*Board of Commissioners.*—A highway laid out by the board of commissioners of a county in 1835, and used by the public and worked and controlled by the road supervisor, could not be changed into a gateway by order of the board of commissioners in 1859, such authority being vested exclusively in the township trustees by the act of June 17th, 1852, 1 R. S. 1852, p. 307.

SAME.—*Act of 1859.*—*Saving Clause.*—In such case the petition presented to the commissioners at the June term, 1859, and granted, was not saved by the saving clause of the act of March 5th, 1859, Acts 1859, p. 113, in force August 6th, 1859, so as to authorize an order of the board at the September term, 1859.

JUDGMENT.—*Jurisdiction.*—A judgment rendered in a case where the court has no jurisdiction of the subject-matter is of no validity whatever.

From the Decatur Circuit Court.

J. S. Scobey and *D. Watts*, for appellant.

J. D. Miller and *F. E. Gavin*, for appellee.

ELLIOTT, C. J.—Appellant was sued for unlawfully obstructing a public highway, and judgment was entered against him.

The questions presented to us arise upon appellant's exceptions to the conclusions of law stated by the court upon a special finding of facts made at the request of the parties. The facts may be thus summarized: In January, 1835, the board of commissioners of Decatur county laid out the highway obstructed by the appellant, and from that time until the year 1860 it was used as a public highway; in the spring of the year 1860 a gate was placed across it and remained there until 1878; that the road was used by the public after the erection of the gate, as it had been before, and it was worked and controlled by the road supervisor as one of the highways of the township. In June, 1859, a petition was presented to the board of commissioners asking that the said highway should be changed into a gateway; three viewers were appointed, one of whom was one of the petitioners, William J.

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Robinson; the viewers reported at the September term following their appointment, and the commissioners adopted the report and directed that the change be made; that the appellant did obstruct the highway by erecting a fence across it on the 13th day of May, 1878.

The court stated as conclusions of law: (1) That the order of the commissioners changing the highway to a gateway is void. (2) That the road is a public highway. (3) That the appellee is entitled to recover.

Counsel for appellant contend that there was no public highway, because it does not appear that the board of commissioners had jurisdiction to make the order. We do not deem it necessary to inquire whether the board did or did not have jurisdiction, for the highway had been uninterruptedly used by the public for more than thirty years. Independently of any order of the board of commissioners, the public had acquired a right to the highway; for user for the requisite length of time gives a right as effectually as an adjudication of the commissioners' court, or the express grant of the owner of the fee.

There is no force in the appellant's argument that the appellee, having shown an express order of the board of commissioners, has no right to claim by prescription. The theory upon which the doctrine of prescription rests is that there was an original right or express grant. Proving an attempt to make an express grant does not weaken the presumption arising from lapse of time.

The only act authorizing the change of public highways to gateways was that of June 17th, 1852. In that act authority was conferred to make changes in highways and to permit gates to be placed across them. 1 R. S. 1852, p. 314. The authority was exclusively vested in township trustees; none at all was conferred upon the commissioners of the county. On the 5th day of March, 1859, an act was passed repealing the provisions of the act of 1852 upon this subject, but it did not take effect until August 6th, 1859. A saving clause was in-

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corporated in the act of 1859, which reads as follows: "Saving all suits and proceedings heretofore commenced and now pending under said sections before the various boards of township trustees within this State, and said suits and proceedings are hereby transferred to the boards of commissioners in the various counties where the same are pending, and said boards of commissioners shall have jurisdiction thereof." It is obvious that this clause did not save the proceedings relied upon by the appellant, because they were not pending before the board of township trustees. They were instituted in the wrong tribunal. The proceedings before the commissioners were utterly void, because they had no jurisdiction of the subject-matter. A judgment rendered in cases where the court has no jurisdiction of the subject-matter, is of no validity whatever.

Judgment affirmed.

Petition for a rehearing overruled.

No. 7845.

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PLEADING.—Demurrer.—Record.—When the demurrer to a pleading is not set out in the record, the ruling of the circuit court on such demurrer will not constitute available error for the reversal of the judgment.

PRACTICE.—Deposition.—Motion to Suppress.—A motion to suppress a deposition, for any objection appearing therein, must be made before entering on the trial, and not afterward. Where the motion to suppress is made after the trial is commenced, for an objection appearing in the deposition, and is sustained by the court, it is an error for which, if properly saved and assigned, the judgment below will be reversed.

From the Monroe Circuit Court.

C. F. McNutt, R. W. Miers and ——— Wilson, for appellants.

J. W. Buskirk and H. C. Duncan, for appellee.

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Howk, J.—This case is now before this court for the second time. When it was first here, the opinion and judgment of this court are reported under the title of *Gabe v. McGinnis*, 55 Ind. 372.

The appellee, as assignee, sued the appellants, as the makers, of a promissory note for \$583.66, dated January 8th, 1871, and payable one day after date to one James Small, or order. In his complaint the appellee alleged, among other things, that, on March 2d, 1874, the said James Small, by his endorsement thereon, assigned the said note to the appellee; that, on the — day of —, 1874, Elizabeth McGinnis, one of the makers of the note, departed this life, and the appellant Mary Small was the administratrix, with the will annexed, of said decedent's estate, and that the note in suit was due and unpaid.

The cause was put at issue and tried by a jury, and a verdict was returned for the appellee; and over the appellants' motion for a new trial, and their exception saved, judgment was rendered on the verdict.

The following decisions of the circuit court are assigned, as errors, by the appellants:

1. In overruling their demurrers to the second, third and fourth paragraphs of the reply; and,
2. In overruling their motion for a new trial.

Of the first of these supposed errors it will suffice to say that the appellants' demurrers to the several paragraphs of the appellee's reply can not be found in the record of this cause. In section 67 of the civil code of 1852, it is provided that "the defendant may demur to a reply for any of the causes specified for demurring to a complaint." In section 50 of the same code it is provided that a complaint may be demurred to for six statutory causes. In the absence from the record of the appellants' demurrers, in the case now before us, it is impossible for us to know for which of these statutory causes they demurred to the several paragraphs of the appellee's reply, or either of them. In such a case, even if it appeared to us that some one or more of the statutory causes of

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demurrer might have been well assigned to the several paragraphs of the reply, or either of them, yet, in the absence of the demurrers, this court could not possibly know that they distinctly specified the grounds of objection, and, if they did not, said section 50 of the code imperatively required that they should be overruled. *Hammon v. Sexton*, 69 Ind. 37. When the demurrers are not set out in the record, no available error can be predicated upon the rulings of the circuit court thereon. *Rout v. Woods*, 67 Ind. 319. It follows, therefore, that no question is presented for the decision of this court by the first alleged error.

2. In their motion for a new trial the appellants assigned the following causes therefor :

1. In excluding from the jury, over the appellants' objections, the deposition of William H. Bodkin, offered by them ;

2. In refusing to continue this cause, upon the appellants' application, for the purpose of retaking the deposition of said William H. Bodkin ; and

3. In excluding the appellant Archibald McGinnis, as a witness for himself and his co-appellant, Mary J. Small.

It appears from a bill of exceptions, which is properly in the record, that at the September term, 1878, of the court below, the deposition of William H. Bodkin, previously taken in this cause, having been published, the appellee's motion to suppress the same was sustained by the court, but the grounds of this decision were not stated or shown in or by the record before us. At the same term of the court the appellants obtained leave to retake the deposition of said Bodkin, and to withdraw the suppressed deposition. Afterward, on January 21st, 1879, the deposition of said Bodkin was again published by an order of the court, and, on the same day, the appellee's motion to suppress questions numbered from four to eleven, inclusive, and the answers thereto, was overruled by the court, and his exception saved to this decision. On January 22d, 1879, the appellee orally moved the court to suppress the

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whole of said deposition, pending which the cause was called for trial; "whereupon said plaintiff withdrew said motion."

On the trial of the cause, to sustain the issues upon their part, the appellants offered to read in evidence, at the proper time, the said deposition of said William H. Bodkin. To which deposition and the reading thereof in evidence, the appellee objected "on the ground that the said deposition was the same deposition that had been suppressed by a former order of the court," at the September term, 1878, thereof, "which objection the court sustained, and excluded said deposition for said reason," and to this decision the appellants at the proper time excepted.

Did the court err in sustaining the appellee's motion to suppress the said deposition of said William H. Bodkin? We are of the opinion that this question must be answered in the affirmative. In section 266 of the civil code of 1852, it is provided as follows:

"All objections to the validity of any deposition, or its admissibility in evidence, shall be made before entering on the trial, not afterwards. But any deposition after the commencement of the trial, may be suppressed, if any matter which is not disclosed in the deposition appears, which is sufficient to authorize such suppression." 2 R. S. 1876, p. 144. This section is re-enacted as section 308 of the civil code of 1881, and is section 439 of the Revised Statutes of 1881.

It will be observed that the appellee's objections to the validity, or admissibility in evidence, of the deposition of said William H. Bodkin in this case, were made *after* entering on the trial of said cause. The grounds of the appellee's objections to said deposition were disclosed and fully appeared in the deposition itself, and, therefore, in this case, the motion to suppress it came too late, and ought to have been overruled. In *Glenn v. Clore*, 42 Ind. 60, upon the point under consideration, this court said: "We are of the opinion, with reference to section 266 of the code, which fixes the time when objections to depositions shall be made, that the swearing of

the jury is the commencement of the trial. The object of the section is that parties may know, so far at least as apparent objections are concerned, that they can depend upon reading in evidence such depositions as have been regularly placed on the files, to be read in the cause, and which have not been suppressed. The rule provided by the statute is convenient, as well as fair; for why empanel and swear a jury to try a cause, which the parties may afterward be prevented from trying on account of the suppression of depositions after the jury are sworn? We hold that the court should not have entertained the motion to suppress the deposition after the jury were sworn, unless the objection related to some matter which was not disclosed in the deposition, which was sufficient to authorize such suppression." *Stull v. Howard*, 26 Ind. 456; *Robinius v. Lister*, 30 Ind. 142.

In the case at bar, the appellee's objection to the deposition offered in evidence by the appellants was, that it was the same deposition which had been suppressed by a former order of the court. This fact was shown by the record, and it was not shown otherwise; for the motion to suppress was not founded upon or supported by any affidavit of any facts *dehors* the record. When, however, the deposition was suppressed, the record further shows that the appellants obtained leave of the court to withdraw the same from the files, and to retake the deposition. The bill of exceptions also shows that afterwards, on the 13th day of January, 1879, an envelope, endorsed with the full title of the case, and addressed to "William F. Browning, Esq., clerk of the circuit court of Monroe county, Bloomington, Indiana," was regularly transmitted to, and received and filed by, the said clerk of said court. Afterwards, on January 21st, 1879, when said envelope was opened on the appellant's motion to publish said deposition, it was found to contain said suppressed deposition, and, also, the notice and *dedimus* for the retaking of said deposition. Thereupon the appellee orally moved the court to suppress this last-published deposition. The grounds of this motion are

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not shown by the record ; but, in the absence of any showing to the contrary, it may be fairly assumed, we think, that the grounds of such motion were, that the deposition then published was the same deposition which had been suppressed by a former order of the court.

When, therefore, upon the calling of this cause for trial, the appellee withdrew his oral motion to suppress said deposition, the appellants were thereby authorized to believe that the appellee withdrew his objections to said deposition, and that they might depend upon reading the same in evidence, without objection, at the proper time. It was competent for the appellee to waive his objection to the deposition, upon the ground that it had been suppressed by a former order of the court, and suffer it to be read in evidence ; and the action of the appellee, in withdrawing his oral motion to suppress the deposition, may well have deceived the appellants, and have led them to believe that he had waived his objections to the deposition. For the reasons given, we are of the opinion that the appellee's objections to the deposition, made after entering on the trial, ought to have been overruled, and that the court erred in excluding it from the jury.

When the court sustained the appellee's objections to said deposition and excluded it from the jury, the appellants moved for a continuance of the cause, upon an affidavit then filed, in order that they might retake said deposition. In said affidavit, the appellant Archibald McGinnis stated in substance, that the deponent, William H. Bodkin, resided in London, Ontario, in the Dominion of Canada ; that more than a year before that time, having learned that said Bodkin was cognizant of certain facts material to their defence, the appellants procured an order of the court authorizing a certain person named therein to take said Bodkin's deposition, and served due notice of the time and place for taking the same on the appellee ; that said deposition was accordingly taken and returned into court, where, on the appellee's motion, it was suppressed, for certain formal defects therein ; that Judge John

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C. Robinson was then temporarily presiding in the court below, when they procured an order of the court authorizing them to retake said deposition, and, notice having been duly given the appellee thereof, the said deposition was retaken and returned into court; that, in the mean time, the venue of the cause had been changed from the regular judge of said court, and Judge James S. Hester had been duly appointed to try this case, and, on the appellee's motion, the deposition was again suppressed, on the ground that said Judge Robinson had not such jurisdiction of the case as that he was authorized by law to make an order for retaking said deposition; that thereupon the appellants procured another order of the court, Judge Hester presiding, authorizing them again to retake said deposition, and, having served the proper notice on the appellee, they sent it and the necessary *dedimus* to the person named in said order, for the purpose of retaking said deposition; that afterwards, on January 13th, 1879, an envelope apparently containing said deposition, endorsed with the title of this cause, and addressed to the clerk of said court, was received and filed by him; that, on January 20th, 1879, Judge Thomas L. Collins presided in said court for the trial of this case, and, the said deposition having been published, the appellants discovered that the person authorized to retake the same had not done so, but had simply returned the last suppressed deposition; that, when said deposition was so published, the appellee first moved the court to suppress certain questions to the deponent and his answers thereto, which motion was overruled; that the appellee then orally moved the court to suppress the entire deposition; and that before the motion was decided it was withdrawn, when the case was called for trial. It was then stated in the affidavit, that the appellants and their counsel were deceived by the appellee's acts in regard to said deposition, and were thereby induced to believe and did believe that he intended to waive, as he lawfully might, the said objections to said deposition, and suffer the same to be read in

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evidence; and that, therefore, the appellants and their counsel were greatly surprised, when, on the trial, the appellee made the said objections to said deposition, and when the court sustained the said objections and excluded the deposition from the jury. In all other respects the affidavit for a continuance was clearly sufficient, and the only question for decision is, whether or not the foregoing facts made such a case of surprise as that the appellants were thereby entitled to a continuance of the cause, after the commencement of the trial.

It is unnecessary, as it seems to us, that we should consider this question at any great length. For it follows inevitably from what we have already said, in considering the question presented by the first cause assigned for a new trial, that, in our opinion, the appellants were probably misled and deceived by the acts of the appellee and his counsel, and were thereby induced to believe that the objections existing to said deposition were waived, and that it would be admitted in evidence on the trial of this cause. In *Haynes v. The State, ex rel.*, 45 Ind. 424, it was held by this court, that where a party to a suit told his adversary, with the view of influencing his action, that certain matters, in issue by the pleadings, would not be controverted on the trial, it would not be negligence in such party to rely on such statement and omit to prove what his adversary had so told him would not be denied, and that, if such matters were controverted by evidence on the trial, the party so misled would be entitled to a new trial on the ground of surprise. The doctrine of this case, we think, is peculiarly applicable to the question as presented in the case at bar. Here the appellee did not say to the appellants in so many words that he waived the apparent objections to said Bodkin's deposition, but by his actions, which are sometimes said to "speak louder than words," he certainly induced the appellants to believe that he waived, as he lawfully might, the said objections to said deposition, and that, on the trial, they might rely upon reading it in evidence. Upon the facts shown in

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the affidavit, upon which the application for a continuance was made, we are of the opinion that the appellants were not at fault in going to trial, relying upon the appellee's waiver of his objections to the depositions, which he had withdrawn and could not make again, under the code, after entering on the trial, and that injustice had probably resulted to them from surprise, at the appellee's subsequent objection to the deposition and the ruling of the court thereon, which a new trial might remedy. Surely, in such a case, a new trial ought to have been granted. *Todd v. The State*, 25 Ind. 212.

The third and last cause for a new trial, assigned by the appellants in their motion therefor, presents for decision the difficult question as to whether or not the appellant McGinnis was a competent witness for himself, or his co-appellant, on the trial of this cause, under the first *proviso* in section 2 of the act of March 11th, 1867, "defining who shall be competent witnesses," etc., 2 R. S. 1876, pp. 133 and 134. We deem it unnecessary for us to decide this question in this case, *first*, because, by reason of what we have already said, the judgment below must be reversed, and, *secondly*, because the law, in relation to the competency of Archibald McGinnis as a witness in the case, has been radically changed in and by the provisions of section 276 of the civil code of 1881, under which the new trial of the cause will probably be had. Revised Statutes 1881, section 498.

For the reasons given, our conclusion is that the court erred in overruling the appellants' motion for a new trial.

The judgment is reversed, at the appellee's costs, and the cause is remanded with instructions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

 Hatton, Ex'r, v. Jones.

No. 8701.

HATTON, EX'R, v. JONES.

78	466
148	236

PRACTICE.—*Supreme Court.*—*Assignment of Errors.*—*New Trial.*—*Suppressing Deposition.*—Error in suppressing a deposition is a reason for a new trial, but not a proper specification in an assignment of errors.

SAME.—*Specification of Error.*—A specification: "The court erred in rendering the judgment in said cause," is too general to present any question for consideration.

SAME.—*Instructions.*—A party desiring further instructions upon a question of law must ask for them.

PROMISSORY NOTE.—*Delivery.*—*Gift.*—*Evidence.*—On trial of an action upon a promissory note, evidence that it was executed to the plaintiff as payee, at the request of her father, a creditor of the maker, and held by him, and that the plaintiff took it from the depository of his private papers in his absence, and without his knowledge or consent, and refused upon request to return it to him, but commenced suit against the maker, sustains a finding that the note was not so delivered as to vest the property therein in her and constitute of it an executed gift.

SAME.—*Trustee.*—*Constructive Delivery.*—In such case the father could not appoint himself trustee for his daughter and make a valid delivery of his own property to himself as such trustee; nor would his intention or promise to give the note to her constitute him a trustee for her.

SAME.—*Deposition.*—In such case the suppression of questions and answers in a deposition of the plaintiff relative to credits on the note, not for payments of the maker, not authorized by her father, and not tending to show a delivery of the note, was not error.

SAME.—*Hearsay.*—*Directions as to Possession.*—In such case, the father not being a party to the action, the daughter's conversations with him, unless a part of the transaction, were inadmissible; but he was properly permitted to testify what directions or assent he gave to her, or any other person, to take possession of the note.

WITNESS.—*Impeachment.*—Questions evidently asked for the purpose of impeachment only, but fixing neither time nor place, are improper.

SAME.—*Evidence.*—*Deposition of Deceased Party.*—*Testimony of Surviving Party.*—Where the deposition of a deceased party, represented by her executor, has been read in evidence, the other party may testify on all material points and matters of fact embraced in the deposition.

NEW TRIAL.—*Affidavit.*—*Newly-Discovered Evidence.*—An affidavit for a new trial on the ground of newly-discovered evidence, not stating the facts expected to be proved, and that the affiant believed such facts to be true, is insufficient.

From the Wayne Circuit Court.

Hatton, Ex'r, v. Jones.

H. C. Fox, W. D. Foulke and J. L. Rupe, for appellant.

T. J. Study, for appellee.

FRANKLIN, C.—This action was originally brought in the name of Eliza H. Hatton as plaintiff. After the action was commenced, she died testate; her death was suggested of record, and the name of the executor of her will, Lemuel C. Hatton, was substituted as the plaintiff in the case.

The action was brought upon a promissory note alleged to have been executed by the appellee, John K. Jones, to said Eliza H. Hatton, for \$1,000, dated May 1st, 1876, and due two years after the date thereof. To the complaint, the appellee filed an answer in seven paragraphs. The fifth, on motion, was stricken out; the first was a denial; second, payment; third, fourth and sixth, *non est factum* sworn to; seventh, want of consideration. Reply by a general denial. Trial by jury. Verdict for appellee. Motion for a new trial overruled, and an exception reserved. Judgment upon the verdict for appellee.

The following errors have been assigned in this court:

"1st. The court erred in sustaining the defendant's motion to suppress the deposition of Eliza H. Hatton.

"2d. The court erred in overruling the plaintiff's motion for a new trial, and in refusing to grant a new trial.

"3d. The court erred in rendering the judgment in said cause."

The ruling, upon a motion to suppress depositions, may be properly alleged as a reason for a new trial, but can not be stated as a proper specification in the assignment of errors. *The Jeffersonville, etc., R. R. Co. v. Riley*, 39 Ind. 568; *Mercer v. Patterson*, 41 Ind. 440; *Patterson v. Lord*, 47 Ind. 203.

The third specification in the assignment of errors is too general to present any question for consideration.

This leaves, as the only question to be considered, the overruling of the motion for a new trial.

The facts in the case as gathered from the record are substantially as follows:

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William C. Jones is the father of the appellee, Lee Jones, Rebecca Masters and the said Eliza H. Hatton; that before the date of said note, the appellee and his said brother Lee were each indebted to their father in a considerable sum for land sold to them by their father, and for which indebtedness the latter held the notes of his said sons; that said father contemplated assisting his said children or equalizing a portion of his property amongst them, and for this purpose, and at his request, his son Lee signed a note, payable to Mrs. Hatton, for \$1,000, and the appellee, John K. Jones, signed a note payable to Mrs. Masters for a like amount, for which they were to have credits on their said respective notes held by their father, which notes were delivered to the father, who held them, without ever delivering them to his daughters, for the purpose, as the testimony tends strongly to show, though there is some conflict upon that question, of investing the amount in real estate for the use and benefit of his said daughters and their children, without letting his sons-in-law have the control of the money; that he afterward informed the daughters of what he had done; that, shortly after this arrangement, Mrs. Masters purchased some real estate, and desired her portion of the money to pay for it. Appellee, John K., was not then in a condition to conveniently pay it. But Lee could pay off his note, which was payable to Mrs. Hatton. The father suggested that Lee pay off his note, and that the money go to Mrs. Masters, and that John give a new note to Mrs. Hatton in the place of the one that he had given to Mrs. Masters. Lee paid the money, the father sent it to Mrs. Masters, and John K. signed the new note to Mrs. Hatton, payable two years after date. The father surrendered the note payable to Mrs. Masters, and took possession of the note payable to Mrs. Hatton. After the new note was due, some time in June, 1878, Mrs. Hatton, while living in a part of the house with her father, in the absence of her father and mother, went into the apartment of the house occupied by them, and from a jar in his cupboard, in which he kept his

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papers, without his knowledge or consent took said note, and has since retained the possession thereof until it was placed in the hands of an attorney for collection. That shortly after missing the note, on being approached upon the subject by the father, she acknowledged the taking of the note, and on being requested by the father and mother to return the note, she refused to do so, and caused this suit to be commenced on the same.

The controversy between the parties is as to whether the note was so delivered as to vest the property therein in Mrs. Hatton.

The first reason in the motion for a new trial is the suppressing of the seventeenth, eighteenth, nineteenth, twentieth, twenty-third and twenty-eighth questions and answers in the deposition of Mrs. Hatton.

These questions and answers had reference to certain payments claimed by appellant to have been made upon the note; \$20 at one time given to Eliza by her mother, and which her mother told her could be credited upon the interest of the note; \$25 paid by her father to Dr. Butler, on her doctor's bill, which her father said could be credited on the note, and a store bill which her father paid at one time, amount not given. The father had not placed any of these credits on the note, and testified that he did not direct Mrs. Hatton to place any of them on it. These questions and answers are insisted upon as being admissible because they tended to prove that the father recognized Mrs. Hatton as owning the note, and her right to control the proceeds. We do not think that they tended to prove that the note had been delivered to Mrs. Hatton, or that the father had surrendered his right to the possession of the note, or the control of the payment, and to manage the appropriation of the proceeds of its payment. There was no pretence that appellee made any payments on the note to Mrs. Hatton. The suppression of these questions and answers, if an error, was a harmless one, but we do not think it was error.

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The motion to suppress as to the sixth and twenty-second questions and answers was not ruled upon at the time of the motion, but reserved to be ruled on at the trial. And the second reason for a new trial was the refusal of the court to allow the plaintiff to read in evidence to the jury these two questions and answers.

The sixth question was this: Upon being shown a copy of the note, she was asked to state all she knew about its execution. Her answer was, detailing a conversation with her father after the execution of the first note and before the execution of the second and the one in suit. This answer was hearsay evidence, and not responsive to the question.

The twenty-second question was in relation to what other payments were made, if any. Her answer was, giving a conversation with the father about the same dry-goods bill as in the questions and answers suppressed, and in relation to crediting the amount on the note. The father was not a party to the suit, and conversations with him, unless they were at the time and as a part of the transaction, were not admissible as evidence, unless for the purpose of impeachment, upon the proper foundation being laid; nothing of which was attempted to be done in this case.

The third reason stated in the motion for a new trial was alleged error in the court in permitting the defendant by his counsel to ask William C. Jones, while on the witness stand, as to what directions, counsel or assent he gave Eliza Hatton, or any other person, to take the note out of his possession, and, over the objections of the plaintiff, the witness to answer the question.

We see no reasonable objection to this question and answer.

The fourth reason was for refusing to permit the plaintiff to ask the same witness, whether he had made certain specified statements to Mrs. Hatton in relation to the signing of the note and leaving it with him. Such questions could only be asked for the purpose of impeachment, and as no time or place was fixed, the court did not err in ruling them out.

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The fifth reason is waived by not being noticed in the brief of appellant.

The sixth reason is error of the court in permitting the appellee, while on the witness stand, to testify to a conversation between himself, his father and Mrs. Hatton, had at his father's house in August, 1879.

The deposition of the deceased Mrs. Hatton was read in evidence, and we think that made the testimony of appellee admissible. The appellee's testimony was only upon material points and matters of fact embraced in the deposition. 2 R. S. 1876, p. 134.

The seventh reason was for newly discovered evidence. The appellant, in his affidavit, stated that if a new trial should be granted to him, he could prove by the witnesses whose affidavits were filed therewith the facts therein stated, without stating any of said facts in his affidavit, or that he believes them to be true. He also states facts which he alleges he was informed that he could prove by a witness in the State of Illinois, but whose affidavit as to the same had not been procured, and he believed such facts to be true. These facts were all, except the payment of \$25 to Dr. Butler by the father, for Mrs. Hatton, on her doctor's bill, hearsay testimony—the mere declarations of the father, not made in connection with any part of the transactions spoken of, and in the absence of appellee. And we think the affidavit is insufficient in form and substance for not stating the facts which he expected to prove by the witnesses whose affidavits accompanied his, and for not stating that he believed such facts to be true. *Shirel v. Baxter*, 71 Ind. 352.

The eighth reason was for alleged error in instructions to the jury, numbered from one to thirteen inclusive.

The appellant, in his brief, only complains of instructions numbered seven and twelve; and the objections to these instructions are, that, while they may state the law correctly as to an actual delivery, they do not go far enough and state the law as to a constructive delivery; this, they say, ought to have

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been done, and the court ought to have instructed the jury upon the difference between an actual and a constructive delivery. If appellant desired further instructions, he ought to have asked for them. It was not error in the court to fail to give such instructions when they were not asked for. This question has been so repeatedly decided by this court, that it is unnecessary to cite authorities.

The ninth and tenth reasons were, that the verdict was not sustained by the evidence, and was contrary to law.

The jury, in addition to their general verdict for appellee, returned the following interrogatories and answers thereto; but the record does not show which, if either, of said parties requested said interrogatories to be answered:

"1st. Did William C. Jones ever deliver the note sued on to Eliza H. Hatton? Answer. No.

"2d. Did the defendant, John K. Jones, ever deliver the note sued on to Eliza H. Hatton? Answer. No."

It is insisted by appellant's counsel, that, under the facts as proven in this case, there was a constructive delivery of the note to Eliza H. Hatton, and that the father constituted himself a trustee to hold said note for the use and benefit of said Eliza. We have been referred by counsel to a number of cases on this question. But they refer to a class of cases where the property had passed into the hands of another person than the donor.

We do not think that a person could appoint himself as trustee and then make a valid delivery of his own property to himself as such trustee; or that an intention or promise to give would make a perfected gift so as to constitute the intender or promisor a trustee for the use of the intended or promised beneficiary.

The case of *Fanning v. Russell*, 94 Ill. 386, is very similar to the one under consideration. There the father deeded lands to his two sons, and took six promissory notes for \$1,500 each for the unpaid purchase-money; each one of the notes was made payable to one of his six daughters. The

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notes were delivered to the father, but were never delivered to the sisters. The court say: "No doubt it was the intention of the father that his daughters should each have the benefit of one of the notes, that is, the principal, the interest being made payable to him, but so long as he retained the possession of such notes, they were his own property, notwithstanding they were made payable to his daughters. Until the notes were delivered it was his privilege to change his purpose and withhold the gifts he may have intended to make. The daughters had no vested interest in the gifts their father may have proposed to make to them, and of course could not compel a specific performance. It does not appear the notes were ever delivered to the beneficiaries named, by the father holding them." The difference between the facts of the two cases is, that in that case the interest was made payable to the father; in this case, the father demanded a return of the note after it had been taken by the payee. In both cases there was an evident intention of the father to retain the possession and control of the notes. The principle there decided is the same as is here in controversy.

The case *Foglesong v. Wickard*, 75 Ind. 258, was based in some respects on a similar transaction, though in that case the notes were made payable to the father, and this court held that, as long as the father held the possession of the notes, it was not a perfected gift.

It is not insisted that there was an actual delivery of the note, and from the evidence, we do not think there was any constructive delivery of it, and it is admitted that without a delivery there could be no perfected gift.

We think the verdict of the jury was sustained by the evidence, and was not contrary to law.

The court below did not err in overruling the motion for a new trial. The judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and the same is, in all things affirmed, with costs.

Toohy v. Sarvis.

No. 8563.

TOOHY v. SARVIS.

NEW TRIAL.—*Misconduct of Jury.*—*Irregularity.*—*Verdict.*—*Evidence.*—*Practice.*—It is irregularity amounting to misconduct on the part of the jury, and good cause for a new trial, that a letter of the losing party, which was attached to a deposition of the prevailing party, and read in evidence, fell into the hands of the jury, with other papers in the cause, although inadvertently, and was read aloud and commented upon by one of the jurors while they were deliberating, and was returned into court with their verdict and the other papers.

SUPREME COURT.—*Evidence.*—*Verdict.*—The Supreme Court will not disturb a verdict because the evidence is conflicting, if there is any tending to sustain it.

From the Ohio Circuit Court.

J. B. Coles, for appellant.

A. C. Downey, for appellee.

NIBLACK, J.—Suit by William H. Sarvis against John Toohy, upon a complaint in two paragraphs.

The first paragraph was upon a bill of exchange drawn by the plaintiff in his own favor upon, and accepted by, the defendant. The second was upon an open account. There was an answer in several paragraphs, and issue joined. Verdict for the plaintiff; new trial refused and judgment on the verdict against the defendant.

The questions discussed by counsel are only such as arose upon the motion for a new trial.

It is contended that the verdict was not sustained by sufficient evidence, and that the jury were guilty of misconduct in having with them at their room, while deliberating upon their verdict, certain papers in the cause, including some depositions and other papers, which had been read in evidence to the jury on behalf of the plaintiff.

The evidence was irreconcilably conflicting, but there was evidence tending to sustain a verdict for the plaintiff for a sum larger than the amount named in the verdict which was returned by the jury.

Toohy v. Sarvis.

We can not therefore disturb the verdict upon the evidence.

As bearing upon the alleged misconduct of the jury, the affidavits of the bailiff to the jury and clerk of the court, filed in connection with the motion for a new trial, substantially establish the following facts:

That after the trial had been concluded and the cause given to the jury, the court adjourned, and, by consent of parties, the jury, attended by their bailiff, were left in possession of the court room; that the papers in the cause, consisting of the complaint, a demurrer, the answer, the reply, a motion to suppress depositions, the summons, and the depositions of one Fletcher and of the plaintiff, with certain letters from the defendant to the plaintiff attached, were inadvertently left on one of the tables in the court room which had been used at the trial; that these papers fell into the hands of the jury while they were deliberating upon their verdict; that, while the jury were so deliberating, one of the jurors read aloud one of the letters attached to one of the depositions, and which had been read in the cause, and commented upon the same to the jury; that, after the jury had agreed upon a verdict, they returned the papers in the cause into court with their verdict.

The question for decision is, Did these facts constitute such misconduct on the part of the jury as vitiated their verdict and made it incumbent on the court to grant a new trial?

It has been said, upon what seems to us to be good authority, that, where there has been an irregularity which may have affected the impartiality of the proceedings before a jury, such as an improper separation of the jurors, or as having had unauthorized communications, or as having had papers before them bearing upon the matters in controversy without the permission of the court, a new trial ought to be granted, so as to undo whatever wrong, if any, which may have been inflicted.

In the case of *Hix v. Drury*, 5 Pick. 296, the court, in referring to irregularities which may, or which may not, vitiate the verdict of a jury, said: "So where a paper which is

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capable of influencing the jury on the side of the prevailing party, goes to the jury by accident, and is read by them, the verdict will be set aside, although the jury may think that they were not influenced by such paper, for it is impossible for them to say what effect it may have had on their minds." *Short v. West*, 30 Ind. 367; 1 *Graham & Waterman New Trials*, 73; *Lotz v. Briggs*, 50 Ind. 346.

The irregularity complained of in this case amounted to what must be held to have been misconduct on the part of the jury, and, in the light of the authorities cited, ought to have been treated as a good cause for a new trial.

The judgment is reversed, with costs, and the cause remanded for a new trial.

No. 7332.

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78	476
135	379
78	476
137	133
78	476
150	110
78	476
154	423

DESCENTS.—*Second or Other Subsequent Wife.*—*Life-Estate.*—The proviso in section 24 of the statute of descents (section 2487, R. S. 1881) limits the right of a second or other subsequent wife in the lands of the husband, who has no children by her but has children alive by a previous marriage, to an estate in fee for her life only in her share of such lands.

SAME.—*Creditors of Husband.*—Such share of such second or other subsequent wife, in the lands of her husband, is held by her during her life, and, upon her death, descends to his children by a previous wife, free from all demands of his creditors.

SAME.—*Power of Administrator.*—*Petition for Sale of Real Estate.*—*Orders of Court.*—*Jurisdiction.*—*Estoppel.*—In March, 1866, A. died intestate, the owner in fee simple of certain real estate, leaving S. A., his widow by a second marriage, and the plaintiffs, his children by his first wife, as his heirs at law. At the October term, 1866, of the court of common pleas, the administrator of A.'s estate filed his petition for an order to sell all of said real estate, for the payment of the decedent's debts, of which petition notice was duly given, in the mode prescribed by law. Upon the hearing, the widow, S. A., made default, and the plaintiffs, then infants,

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answered by their guardian *ad litem*; and the court then found that S. A. was the owner of a life-estate in one-third of said real estate, and ordered that the whole of said real estate be sold, subject to her said life-estate. On November 24th, 1866, S. A. consented that her interest in the real estate might be sold at the same time the decedent's interest therein was sold, under the order of the court, agreeing to take for her interest such allowance as the court might make her out of the proceeds of such sale. On February 23d, 1867, the administrator of A. sold the said real estate, in accordance with the order of the court and the consent of S. A., to one M., which sale was confirmed by the court, and a deed was ordered to said purchaser. At the next term of the court, the administrator of A. filed his petition, praying the court to declare the interest of S. A. in the proceeds of the sale of the real estate, together with her written agreement to accept a part of the money in lieu of her life-estate therein; and the court found the value of her life-estate in one-third of the proceeds to be a certain sum of money, which was fully paid by the administrator of A., under the order of the court, and accepted by S. A. in full satisfaction of her interest in the real estate. The widow, S. A., died in 1875, and from and under the said M., by regular conveyances, the defendants claimed title to all said real estate.

Held, that the foregoing facts constituted no defence whatever to the claim of the plaintiffs to the one-third of the real estate which, upon A.'s death, descended to S. A. in fee simple for her life only, and which, upon her death, descended in fee simple to the plaintiffs, free from all demands of the creditors of A.

Held, also, that the administrator of A. was not authorized by law to petition for, and the court of common pleas had no jurisdiction to order, the sale of such one-third, for the payment of A.'s debts.

Held, also, that the plaintiffs were not estopped, by any of the facts aforesaid, from asserting their claim and title to such one-third part of the real estate, when, upon the death of S. A., the same descended to them in fee simple.

PARTITION.—*Statute of Limitations.*—An answer to a complaint in partition, that the cause of action did not accrue within five years before the commencement of the suit, nor within two years after the plaintiffs became of full age, is bad on demurrer, for want of sufficient facts.

From the Rush Circuit Court.

G. B. Sleeth and J. W. Study, for appellants.

L. Sexton and C. Cambern, for appellees.

Howk, J.—In this action the appellants, William B. Armstrong, Mary E. Kirkpatrick and George W. Kirkpatrick, her husband, Aaron G. Armstrong and Thomas H. Arm-

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strong, the plaintiffs below, complained of the appellees, John Cavitt and Amanda Cavitt, his wife, defendants, and alleged in substance in their complaint, that the appellants, except said George W. Kirkpatrick, were the children and only heirs at law of John N. Armstrong, late of Rush county, deceased, who died intestate, on the 13th day of March, 1866; that, beside the appellants, the said John N. Armstrong left, surviving him, Samantha Armstrong, his widow, who was his second wife, without children, the said appellants being the children of said decedent by his first wife; that, at the time of his death, the said decedent was the owner in fee simple of certain real estate, particularly described, in Rush county; that at the death of said John N. Armstrong, the one-third part in value of said real estate descended to his said widow in fee, during her natural life, and at her death to the said appellants; that the said Samantha Armstrong departed this life on the day of , 1875, and that, at her death, the said undivided one-third part of said real estate descended to the said appellants, except said George W. Kirkpatrick, in equal shares in value, in fee simple; and that the said appellee John Cavitt was then in the possession, and claimed to be the owner, of the whole of said real estate, but that, in truth and in fact, he was the owner only of the undivided two-thirds part in value of said real estate. Wherefore the appellants prayed that partition be made of said real estate, and their share thereof be set off to them, and for other proper relief.

The appellees answered in five paragraphs, to the fourth of which the appellants' demurrer, for the alleged insufficiency of the facts therein to constitute a defence to their action, was overruled by the court, and to this ruling they excepted. They then refused to reply to said fourth paragraph of answer, and the court rendered judgment against them, on their demurrer to said paragraph, for the appellees' costs.

In this court the appellants have assigned, as error, the decision of the circuit court, in overruling their demurrer to the fourth paragraph of the appellees' answer.

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The appellees admitted, in the fourth paragraph of their answer, that John N. Armstrong died intestate, on the 13th day of March, 1866, the owner in fee simple of the real estate described in the complaint, leaving the appellants as his children and heirs at law, and the said Samantha Armstrong, his widow, by a second marriage, without children by him, and that the said Samantha had died on the day of , 1875, as alleged in the complaint; and the appellees averred, that Leonidas Sexton, as the administrator of the estate of said John N. Armstrong, deceased, at the October term, 1866, of the court of common pleas of Rush county, filed his petition for an order authorizing him to sell all the decedent's real estate described in the appellants' complaint, for the payment of the debts of the decedent's estate; that notice of the filing of said petition was duly given by publication thereof in a weekly newspaper, of general circulation, printed and published in Rush county, for more than three weeks prior to the time of hearing said petition, and by posting up similar notices in three public places in the township where said real estate was situate, for the same period of time; that at said October term, 1866, the said petition was presented to said court of common pleas; that a guardian *ad litem* was appointed by the court for the appellants, who were then infants, and the said guardian filed his answer to said petition; that the said Samantha Armstrong failed to appear, in person or by attorney, and was defaulted; that the said cause having been fully heard, the court found that the matters alleged in said petition were true, and that the said Samantha, as the decedent's widow, was the owner of a life-estate in one-third part of said real estate; that the court then ordered the said real estate to be sold, subject to the said life-estate of said Samantha in the one-third part thereof; that on the 24th day of November, 1866, the said Samantha consented that her said interest in said real estate should be sold at the same time that the interest of the decedent therein should be sold, under said order of said court, agreeing to take for her said interest

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such allowance as said court should afterwards make to her out of the proceeds thereof; that afterwards, on the 23d day of February, 1867, said administrator sold the real estate described in appellants' complaint, being part of the lands described in said petition, in accordance with the order of said court and said consent of said Samantha, to one Samuel E. McMillan, which sale was confirmed by said court, at its February term, 1867, and upon the administrator's report of his receipt of the purchase-money, the court ordered a deed to said purchaser; that, at the May term, 1867, of said court, the said administrator filed his petition, praying the court to declare the said Samantha's interest in the proceeds of said real estate, together with her written agreement to accept a portion of the money in lieu of her life-estate in one-third part thereof, and the court found that said Samantha was entitled to an interest to the extent of one-third for life in one-third of the proceeds of said land, and that said interest was worth \$513.60, which was fully paid by said administrator, under said order, and accepted by said Samantha in full satisfaction of her interest in said land; and that said McMillan conveyed said land to Abram Hackleman, who conveyed the same to Adam Pleisinger, who reconveyed the same to said Hackleman, who afterwards conveyed the same to the appellees. Wherefore the appellees said the appellants were estopped to claim any interest in said land, and they demanded judgment for their costs.

Did the court err in overruling the appellants' demurrer, for the want of sufficient facts, to this fourth paragraph of the appellees' answer? It was admitted, in said paragraph, that John N. Armstrong had died intestate, the owner in fee simple of the real estate in controversy, leaving the appellants as his children and heirs at law, and Samantha Armstrong as his widow, by a second marriage, without children by him. Upon these admitted facts, it would seem to be clear that Samantha Armstrong, upon the death of her said husband, John N. Armstrong, took her share or interest in said real estate

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under the provisions of section 17 of the act of May 14th, 1852, regulating descents and the apportionment of estates, and that she held such share or interest, during her natural life, by the limited and qualified tenure prescribed in the proviso, in section 24 of the same act. This proviso reads as follows: "*Provided*, That if a man marry a second or other subsequent wife, and has by her no children, but has children alive by a previous wife, the land which, at his death, descends to such wife, shall, at her death, descend to his children." 1 R. S. 1876, p. 412.

Under the rule of descent contained in this statutory provision, and directly applicable to the admitted facts in this case, we are of the opinion that the share or interest in the real estate described in the complaint, which descended to said Samantha Armstrong, upon her death in 1875, descended to the appellants as the children and heirs at law of her deceased husband, John N. Armstrong, by his first wife. The share of said Samantha, in said real estate, was free from all demands of the creditors of John N. Armstrong, and was not liable to be made assets for the payment of his debts; and the sale and conveyance of her share, by his administrator, though made with her written consent, and though she received a part of the purchase-money, did not defeat the rights of the appellants nor deprive them of their inheritance, upon her death, in and to her said share of said real estate. This is the construction which this court has repeatedly given to the statutory provision above quoted, and we have no doubt of its correctness, and no desire to change or disturb it. *Louden v. James*, 31 Ind. 69; *Longlois v. Longlois*, 48 Ind. 60; *Hendrix v. Sampson*, 70 Ind. 350.

We do not understand the appellees' counsel to controvert the correctness of the construction given by this court to the statutory provision quoted, in the cases cited; but they earnestly insist that the appellants are estopped to maintain this action, by the proceedings had upon the administrator's petition

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for the sale of all the real estate in controversy, in and by the court of common pleas of Rush county. These proceedings are fully stated in said fourth paragraph of answer. If it could be correctly said that the court of common pleas had jurisdiction of the administrator's petition, in so far as it sought to sell the interest of said Samantha Armstrong in said real estate, both as to the subject-matter and as to the persons of the appellants, then it would follow, we think, that the appellants would be estopped from instituting or maintaining this action. For, in that event, the proceedings of the court could not have been attacked collaterally, but only in a direct proceeding. This is the settled rule of law on this subject, as recognized and acted upon in numerous decisions of this court. *The Board, etc., of Lawrence Co. v. Hall*, 70 Ind. 469; *Hume v. The Little Flat Rock Draining Association*, 72 Ind. 499; *Muncey v. Joest*, 74 Ind. 409.

In the case at bar, however, we are of the opinion that, in so far as the administrator's petition sought the sale of Samantha Armstrong's interest in the real estate, the court of common pleas did not have, and could not acquire, jurisdiction of the subject-matter of such petition; and, in the absence of such jurisdiction, we need hardly say that its proceedings were, that far forth, *coram non judice* and wholly void. Her interest in the real estate, under the law, descended to Samantha Armstrong in fee simple free from all demands of the creditors of her deceased husband, and, therefore, was not subject to be converted into assets for the payment of his debts. The decedent's administrator had no better legal right, as it seems to us, to apply for an order to sell, or to sell, the real estate which so descended to said Samantha Armstrong, than he had to apply for such an order to sell, or to sell, the real estate of any other living freeholder in Rush county, in no manner connected with his decedent. Nor did the court of common pleas have, nor could it acquire, under the law, jurisdiction of the administrator's petition, in so far as it sought the sale of the real estate so descended to said Samantha, any more

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than it would have had, or could have acquired, such jurisdiction if such petition had sought the sale of the real estate of some other living freeholder of the county, in no wise connected with his decedent's estate.

Did the court of common pleas have jurisdiction of the persons of the appellants, as defendants to the administrator's petition, in so far as said petition sought the sale of the real estate which descended to said Samantha Armstrong, as the widow of the administrator's decedent? We are of the opinion that this question ought to be, and must be, answered in the negative. It was alleged in said fourth paragraph of answer, the substance of which we have given, that, when the administrator's petition was presented to said court of common pleas, the appellants were infants, and that a guardian *ad litem* was appointed for them and filed their answer to said petition. At that time the appellants had no interest whatever in the real estate of their father, which, upon his death, descended to his widow and their step-mother, said Samantha Armstrong. They were not required to answer, and could not and did not answer, having no legal right to answer, the administrator's petition, in so far as such petition sought the sale, if it did seek such sale, of the real estate which had so descended to said Samantha Armstrong. The court then ordered that all the real estate described in said petition should be sold by the administrator, subject to what was called "the said life-estate of Samantha in the one-third part thereof." Whatever else might be said concerning said order, it is certain, we think, that it can be correctly said that the order of the court did not and could not affect, and did not purport even to affect, in any manner or to the slightest extent, the interest in the real estate then held in fee simple by said Samantha Armstrong, and which upon her death in 1875, and not before, descended to the appellants, in absolute fee simple, under the rule of descent prescribed in the above quoted proviso, in section 24 of the law of descents.

The fourth paragraph of the answer shows, that the order

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for the sale of said real estate was made by the court of common pleas, at its October term, 1866. It further shows, that afterwards, on the 24th day of November, 1866, the said Samantha Armstrong consented that her interest in said real estate might be sold at the same time that the administrator made his sale, under said order of the court. But the paragraph does not show, nor is it now claimed by the appellees' counsel, that the appellants were or could have been parties to, or in any manner bound by, such consent of said Samantha for the sale of her interest only in said real estate.

It is further shown in said fourth paragraph of answer, that afterwards, at the May term, 1867, of said court of common pleas, the said administrator filed his petition, praying the court to declare the said Samantha's interest in the proceeds of said real estate, with her written agreement to accept a portion of the money in lieu of her life-estate in the one-third thereof; and that the court had found the value of her life-estate to be a certain sum of money, which was fully paid to her by the administrator, under the order of the court. It is not claimed, however, by the appellees' counsel, that the appellants were made parties to this petition of the administrator, or that they were or could have been parties to, or in any manner bound by, the said agreement of said Samantha Armstrong. The paragraph of answer does not show that the appellants were notified in any manner of the pendency of this latter petition of the administrator, or that they were required to answer or did answer said petition, either in person or by guardian *ad litem*.

Upon the whole case, as presented by the demurrer to the fourth paragraph of the answer, it might well be doubted, as it seems to us, whether any of the proceedings had by the administrator, or by said Samantha Armstrong, or by said court of common pleas, as stated in said paragraph, did in terms affect the one-third of the real estate which descended to said Samantha, in fee simple, and which, upon her death in 1875, and not before, descended in fee simple absolute to

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the appellants, beyond, perhaps, an estate for her life therein. Manifestly, however, those proceedings were so had upon the theory, the one-third of said real estate, which descended to said Samantha, so descended to her for her life only and not in fee, but that the fee simple estate therein, upon the death of said John N. Armstrong, descended at once to the appellants, as his children and heirs at law, subject to such estate for life. This theory is in direct contravention of the plain letter of the statute of descents, and can not be upheld. But in view of this theory we are clearly of the opinion, for the reasons heretofore given, that in so far as the administrator's petition sought the sale, if it did seek the sale, of the one-third of the real estate which first descended in fee to said Samantha Armstrong, and which, at her death in 1875, and not before, descended in fee simple to the appellants, the court of common pleas of Rush county, never had nor could acquire jurisdiction either of the subject-matter of the petition, or of the persons of the appellants as the defendants therein. It follows, that the appellants were not estopped by any of the proceedings or orders of said court of common pleas, upon said petition, from asserting their title to the one-third of the real estate which descended to them in fee simple, upon the death of said Samantha, in 1875, and not before her death.

The court clearly erred, as it seems to us, in overruling the appellants' demurrer to the fourth paragraph of appellees' answer.

The appellees have assigned, as a cross error, the decision of the circuit court in sustaining a demurrer for the want of sufficient facts, to the fifth paragraph of their answer.

In this paragraph the appellees alleged, in substance, that, on the 23d day of February, 1867, the real estate described in the complaint was sold to one Samuel E. McMillan, by order of the court of common pleas of Rush county, on an application filed by the administrator of John N. Armstrong, who was the father of the appellants, for the payment of the debts

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of said decedent; that the appellants were served with notice of said proceedings according to law, and appeared and answered said petition, and that said sale was confirmed by said court on the — day of February, 1867; that said McMillan conveyed said land to Abram Hackleman, who conveyed the same to Adam Pleisinger, who reconveyed the same to said Hackleman, who conveyed the same to the appellees. Wherefore the appellees said that the cause of action mentioned in the appellants' complaint did not accrue within five years before the commencement of this action, nor within two years after the appellants became of full age; and they demanded judgment for costs and all proper relief.

It will be observed that this paragraph of answer in no manner controverts any of the allegations of the appellants' complaint. In such a case, section 74 of the civil code of 1852 provides, that "Every material allegation of the complaint, not specifically controverted by the answer, * * * shall, for the purpose of the action, be taken as true." 2 R. S. 1876, p. 71. In determining the sufficiency of the fifth paragraph of the answer, in this case, it must be construed in connection with the allegations of the complaint, which, for such purpose, except as to dates, must "be taken as true." *Nicholson v. Caress*, 59 Ind. 39; *Caress v. Foster*, 62 Ind. 145; *Albert v. The State, ex rel.* 65 Ind. 413; *Earle v. Peterson*, 67 Ind. 503; *Cole v. Wright*, 70 Ind. 179; *Matter v. Campbell*, 71 Ind. 512.

Thus construing the fifth paragraph of answer, we have no difficulty in reaching the conclusion that it did not state facts sufficient to constitute a defence to the appellants' cause of action. For, in their complaint, the appellants alleged certain facts which showed beyond doubt that one-third of the real estate had descended in fee, upon the death of John N. Armstrong, to his second wife, Samantha Armstrong, free from all demands of his creditors, and that, therefore, his administrator had no legal right to ask, and the court of common pleas had no jurisdiction to order, the sale of said one-

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third of said real estate for the payment of said decedent's debts. Further facts were alleged in the complaint which clearly showed that the appellants never had any title whatever to the said one-third of said real estate until it descended to them in fee simple, under the law, upon the death of said Samantha Armstrong in 1875. This was the case made by the complaint, which must "be taken as true," except as to the dates named therein, in determining the sufficiency of the fifth paragraph of answer, as a defence to such case. We are clearly of the opinion that this fifth paragraph did not state facts sufficient to constitute any defence to the appellants' cause of action, as stated in their complaint. It follows, therefore, that the court committed no error in sustaining the demurrer to the fifth paragraph of answer.

The limitation pleaded by the appellees in the fifth paragraph of their answer was wholly inapplicable to the cause of action stated in the complaint. The appellants sued to obtain the partition of certain real estate, of which they claimed to be the owners in fee simple of the undivided one-third part, by descent cast upon them on the death of Samantha Armstrong. It is certain that the limitation of five years, pleaded by the appellees, was no sufficient bar to the appellants' cause of action. *Jenkins v. Dalton*, 27 Ind. 78; *Nicholson v. Caress*, 59 Ind. 39; *Schori v. Stephens*, 62 Ind. 441.

The judgment is reversed, at the appellees' costs, and the cause is remanded, with instructions to sustain the demurrer to the fourth paragraph of answer, and for further proceedings not inconsistent with this opinion.

No. 8294.

WRIGHT ET AL. v. CRABBS ET AL.

PROMISSORY NOTE.—*Illegal Consideration.*—*Grain-Broker.*—*Margins.*—In a suit upon a promissory note, it was found specially that the note was

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given to a grain-broker in consideration of commissions and advances upon wheat purchased by him for the maker, that the maker of the note had entered into a combination with others to purchase through the plaintiff and other brokers, for delivery during a certain month, more wheat than there was in the market, thereby forcing the price to a high rate, with a view to make profit on settling with sellers failing to deliver. Whether the plaintiff was a party to this combination, or had knowledge of it, was not found. A conclusion of law that the note was valid, and the plaintiff entitled to recover upon it, was held to be correct.

From the Shelby Circuit Court.

T. B. Adams and *L. T. Michener*, for appellants.

E. P. Ferris, *W. W. Spencer* and *J. S. Ferris*, for appellees.

WORDEN, J.—Action by the appellees against the appellants upon a promissory note executed by said George M. Wright and said Cyrus Wright, in his lifetime, payable to the plaintiffs, the appellees herein, for the sum of eleven hundred and four dollars and a fraction, with attorney's fees, if suit be brought upon it, dated July 2d, 1873, and payable two years after date with ten per cent. per annum interest.

The defendants answered in three paragraphs; the first alleged that the note was given without any consideration, and the second and third alleged matters intended to show that it was given upon an illegal consideration.

Issue, submission to the court for trial, and, at the request of the parties, a special finding of the facts, with conclusions of law thereon, was made.

The following is the special finding, with the conclusions of law thereon:

"Prior to June, 1873, the deceased, Cyrus Wright, with others, employed the plaintiffs, who were grain-brokers in Toledo, Ohio, to make or procure contracts for them, for the purchase by them of grain known as 'Michigan Amber wheat;' that the intention of the deceased, and the others who were acting with him, was to purchase and hold contracts, or 'options,' for the delivery of wheat to them in the month of June, of that year, to an amount largely in excess of the quantity of such wheat which would be in the market

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at that time, and thus compel parties, who had wheat of that kind to furnish in discharge of their contracts, to pay the difference or margin; that at the time of making such arrangements there were only sixty or seventy thousand bushels of such wheat in the market at Toledo, and the intention of the parties to the combination was to purchase or procure contracts, or 'options,' for at least double that amount; that the contracts or 'options' should all mature during that month, and all available wheat would thus be delivered on their contracts; other brokers, if necessary, were to assist in carrying out the plan. It was expected that some one of the interested parties would, at the agreed time, bid a high price for such wheat; that this would fix the price and govern in the settlement of the outstanding contracts; that the only difficulty in the way was to purchase the necessary amount of 'options,' and to overcome this difficulty, the plaintiffs were to get other firms of brokers to assist them. Contracts to the amount of 100,000 to 130,000 were purchased by the plaintiffs for the deceased and the others, but the intended speculation was a failure; no 'corner' in that kind of grain was created. It turned out that there was more wheat of that kind in the market than was needed to fill the contracts. The plaintiffs urged the deceased and others acting with him, to buy more wheat, and frequently sent to them for money to keep up 'margins.' The first day of July, 1873, found the deceased and the others with contracts for a large quantity of wheat on their hands, which they had to sell at a less price than cost. Nothing was said about the actual delivery of the wheat contracted for, but parties who had contracts to fill were expected to pay the difference. It does not appear how much wheat the deceased had contracted, or whether or not any wheat was actually delivered to him, or that it was expected any wheat should be actually delivered to him.

"The court further finds that afterwards, viz., on the 20th day of July, 1873, on a settlement between the plaintiffs

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and the deceased, concerning such matter, the note which is sued upon in this action was made and given by the said Cyrus Wright and the said George M. Wright.

"The court further finds that there is due upon said promissory note, of principal and interest, the sum of seventeen hundred and two dollars, and that a reasonable attorney's fee in this case, for plaintiff's attorney, is ninety dollars.

"As a conclusion of law the court finds that the said promissory note is legal and valid, and that the plaintiffs are entitled to judgment for the amount thereof as aforesaid, and for said amount for attorney's fees. A. C. DOWNEY."

The defendants excepted to the conclusions of law deduced by the court from the facts found, but the exception was overruled and judgment rendered for the plaintiffs.

The supposed error of the court below in its conclusions of law presents the only question involved here.

We can not say that there was any error in the conclusions of law. The finding does not show that the plaintiffs were parties to any arrangement or combination to get up a "corner" in wheat, or to do anything else in violation of law or against public policy; nor, indeed, that they had notice of such intention on the part of Cyrus Wright, or those acting with him. Cyrus Wright, with others, it appears, employed the plaintiffs to purchase wheat for them. This, so far as we can see was a legitimate business. It is not found that the plaintiffs knew anything of the purpose or intention of Wright and those acting with him in purchasing the wheat, or of the combination mentioned in the finding.

It is found that "other brokers, if necessary, were to assist in carrying out the plan," and "that the only difficulty in the way was to purchase the necessary amount of 'options,' and to overcome this difficulty the plaintiffs were to get other firms of brokers to assist them."

These portions of the finding are the only ones that present any difficulty. The significance of the finding, however,

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should not be construed to extend beyond what the terms employed fairly import. It must be borne in mind also that the burden of making out the defence rested upon the defendants. It was for them to make the facts constituting a defence affirmatively appear. *Parker v. Hubble*, 75 Ind. 580.

The language of the finding does not, as we think, fairly imply that the plaintiffs took the employment from Wright and others in purchasing the wheat, with a view of aiding the latter in accomplishing the purpose mentioned, nor that they had notice of such purpose.

The finding shows that the plaintiffs were to get other firms of brokers to assist them in purchasing the options necessary to carry out the plan; but this is consistent with the idea that the plaintiffs may have been entirely ignorant of the plan or the purpose which Wright and others had in view. Wright and others, for aught that appears in the finding, may have advised the plaintiffs of the amount of options they thought necessary to carry out the plan, and have instructed them as to the amount required, without disclosing to them the plan or the object of the purchases.

The fact that "the plaintiffs urged the deceased, and others acting with him, to buy more wheat, and frequently sent to them for money to keep up margins," does not seem to us to have any special importance. We suppose the more wheat the plaintiffs purchased for Wright and others, the more commissions they would earn; and we see nothing in the facts thus stated that bears upon the question involved. It seems to us that an answer setting up the facts found by the court would be fatally defective on demurrer for want of facts.

The judgment below is affirmed, with costs.

Petition for a rehearing overruled.

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136	312
78	492
157	303

CRIMINAL LAW.—*Indictment.*—*New Trial.*—*Evidence.*—Where the evidence fails to show that the defendant is guilty of the offence charged in the indictment, his conviction will be contrary to law, and a new trial must be granted.

From the Monroe Circuit Court.

J. R. East, W. H. East, J. E. Henley, J. W. Buskirk and W. C. L. Taylor, for appellant.

D. P. Baldwin, Attorney General, *H. C. Duncan*, Prosecuting Attorney, and *G. W. Friedley*, for the State.

HOWK, J.—In this case, the indictment against the appellant, and four other named persons, contained two counts. In the first count, it was charged in substance, that the appellant and his co-defendants, “on the 11th day of May, A. D. 1881, in said county and State aforesaid, did then and there feloniously steal, take and carry away eight pairs of boots, of the value of \$25, of the goods and chattels of Elsberry W. Crane then and there being found, contrary to the form of the statute,” etc.

The second count of the indictment was apparently predicated on the same transaction as the one described in the first count, for the only material difference between the two counts consists in this, that, in the second count, the stolen property was charged to be “of the goods and chattels of the Louisville, New Albany and Chicago Railway Company.”

The appellant and his co-defendants jointly interposed a verified plea in abatement to said indictment, to which plea the State’s demurrer was sustained by the court, and to this ruling the defendants jointly excepted. The joint motion of the appellant and his co-defendants, to quash the indictment, was overruled by the court, and their exception was duly saved to this ruling. On arraignment, for plea to the indictment, the appellant and his co-defendants said that they were

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not guilty as therein charged. The appellant, Daniel A. Stout, having been awarded a separate trial, the issues as to him were tried by a jury, and a verdict was returned finding him "guilty of grand larceny, as charged in the indictment," and assessing his punishment at imprisonment in the State's prison for two years, and a fine of five dollars, and disfranchisement and incapacity for holding any office of trust or profit for the period of two years. Over his motion for a new trial, and his exception saved, the court rendered judgment on the verdict.

The appellant has here assigned, as errors, the following decisions of the circuit court:

1. In sustaining the State's demurrer to his plea in abatement.
2. In overruling his motion to quash each count of the indictment; and,
3. In overruling his motion for a new trial.

The appellant's counsel have not, in their brief of this cause, discussed any question presented by, or arising under, the first two of these alleged errors; and therefore, under the settled practice of this court, those errors must be regarded as waived. This leaves for our consideration such questions only as are fairly presented by the alleged error of the court in overruling the motion for a new trial. Much of the able and elaborate brief of the appellant's counsel is devoted to a critical examination of the instructions given the jury by the court, of its own motion. The view which we feel constrained to take of this case, as made by the evidence in the record, renders it unnecessary for us to consider and pass upon the instructions complained of.

In his motion for a new trial, the appellant assigned as causes therefor, among others, that the verdict of the jury was not sustained by sufficient evidence, and that it was contrary to law. A careful reading and consideration of the evidence contained in the record have convinced us that these causes for a new trial were well assigned. Whatever else may

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be said of the evidence, we are of the opinion that it did not show, nor tend to show, that the appellant was guilty of the larceny charged in the indictment. His conviction of larceny was not, as we think, sustained by the evidence, and, therefore, it was contrary to law.

For these reasons, it seems to us that the court clearly erred in overruling the appellant's motion for a new trial.

The judgment is reversed, and the cause is remanded with instructions to sustain the motion for a new trial. The clerk will issue the proper notice for the return of the appellant into the custody of the sheriff of Monroe county.

No. 8459.**GREEN v. WEEVER.**

DECEDENTS' ESTATES.—Widow.—*Liability for Expenses of Funeral and Last Sickness.*—If a widow accepts or procures the entire estate to be delivered to her as being worth less than \$500, she becomes liable for the reasonable expenses of the funeral and last sickness of her deceased husband.

From the Posey Circuit Court.

E. M. Spencer, for appellant.

W. P. Edson, for appellee.

WOODS, J.—The appellant procured an order of the proper court, setting off to her, as widow, the entire estate of her deceased husband as worth less than \$500; thereupon the appellee sued her for the value of his services as a physician to the deceased during his last illness.

The court overruled a demurrer to the complaint, and, upon a trial had, found for the plaintiff, and gave judgment accordingly.

The ruling upon the demurrer is assigned for error. The

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single question discussed by counsel is, whether, in such case, the widow takes the estate free from all demands of creditors, or is liable to "be sued for reasonable funeral expenses of the deceased, and expenses of his last sickness."

The latter would seem to be the rule.

By the 19th and 20th sections of the law of descent, approved May 14th, 1852, it was contemplated that the widow should have the estate to the amount of \$300, "free from all demands of creditors," irrespective of the mode in which the amount should be set off to her; but by the 136th section of the act concerning the settlement of decedents' estates, approved June 17th, 1852, 2 R. S. 1876, p. 542, it was provided, that upon obtaining possession of the entire estate, by order of the court, "such widow shall not be liable for any of the decedent's debts, except mortgages of real estate, but she may pay and may be sued for reasonable funeral expenses of the deceased; and expenses of his last sickness."

This being the later expression of the legislative will, was, so far, a modification of the law of descent. Sections 133 and 134 of the last named act were so amended by the act of February 24th, 1869, Acts 1869, p. 32, as that estates not exceeding \$500 might, by the order of the court, be delivered into the possession of the widow, but no amendment or repeal of the 136th section seems to have been attempted, and we are not able to perceive any legal ground on which it may be said that the provisions of that section are not in force or do not apply to the case before us.

It is true that, under section 43 of the last named act, a widow might have selected from the inventory of her husband's estate goods or money to the amount of \$300, and under that section, as amended by the act of February 8th, 1871, Acts 1871, p. 46, she may still select from the inventory to the amount of \$500, or have that sum paid to her out of the first moneys received by the executor or administrator, and for any deficit may enforce a lien against the real estate, and hold the property or money so received free from all demands of

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creditors; and yet it seems to be the explicit rule of the statute, that if she procures the estate to be delivered to her, or accepts it, under sections 133 to 136, inclusive, she becomes liable for reasonable funeral expenses, and for the expenses of the last sickness.

There may be, as it is claimed there is, no consistency in the provisions of the law in this respect, but the letter of the law is too explicit to admit of interpretation, and the remedy, if any is to be had, must come from the Legislature.

Judgment affirmed, with costs.

 No. 8380.

McGREW ET AL. v. McCARTY ET AL.

MECHANIC'S LIEN.—*Decedents' Estates.*—A mechanic's lien upon lands of the ancestor may be enforced against the lands in the hands of his heir, but a personal judgment against the heir can not be obtained.

SAME.—*Notice.*—A joint notice of mechanic's lien by two or more persons having separate claims against distinct parcels of property is bad; so also is a single notice by one against separate parcels, seeking to charge both parcels with the aggregate of his claims against each.

PRACTICE.—*Demurrer.*—*Motion to Strike Out.*—A bad complaint should be met by demurrer, but, if the right result be reached by a motion to strike out, the irregularity is not available error.

From the Harrison Circuit Court.

S. K. Wolfe, A. Stephens, W. H. H. Hudson and G. W. Self,
for appellants.

W. T. Jones, for appellees.

ELLIOTT, C. J.—This is an action to enforce liens asserted by the appellants, as mechanics and material men, against real estate of which George McCarty died the owner. The complaint alleges that the liens were acquired in McCarty's lifetime, and that the appellees are his children and heirs.

78	496
144	620

78	496
157	279

78	496
168	532

78	496
1169	120

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A complaint alleging that materials were furnished for, and used in the construction or repair of, a building, does not entitle the plaintiff to recover a personal judgment against the heirs of the person who dies the owner of the property. The lien, if valid, may be enforced against the property, but it can not be allowed to create a personal liability against the heirs.

Appellants complain of the ruling of the court sustaining appellees' motion to strike out part of their complaint. We do not deem it necessary to consider this question. The complaint is bad either with or without the part rejected by the court. One of the notices of the liens is a joint one by several persons holding separate claims against distinct pieces of property, and the other notice is by one person, but against at least two different parcels of property. The principle laid down in *Hill v. Braden*, 54 Ind. 72, decides this case against the appellants. It was said in that case: "Our mechanics' lien law, by its terms, contemplates only a separate lien on a single building; not a joint lien on several buildings." At another place, it is said: "So far as the lien is given upon the lot or land, it is only as an incident to the lien upon the house on the lot or land, for the materials in the house; the house and lot or land on which it stands, the curtilage, constituting one parcel of real estate. As the mechanics' lien act contemplates only liens on separate pieces of property, so it contemplates only a notice of intention to hold a lien on a separate piece of property, including, of course, its appurtenances." This doctrine is approved in the later case of *Wilkerson v. Rust*, 57 Ind. 172. The reason of the rule is thus given by Mr. Phillips: "If the work be done or materials are furnished upon distinct premises, the lien must be against each of the several premises, according to the value of the work and materials incorporated in each, and not against both for the aggregate amount. The reason a joint claim may be sustained against several houses put up at the same time, without an interval between them, is, that they may be considered as one

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building, and, consequently, as an integer or unit which may be covered by one claim. But this can not be asserted with any truth in case where there is an interval, however small, which prevents the whole from being one continuous structure. It has accordingly been held that a joint claim against separate blocks of houses in different streets is a nullity, and the same principle applies to different blocks on different sides, or on the same side of the same street, and in every instance where the structure against which the claim is filed is not substantially one building." Phillips Mech. Liens, section 376. There is still another reason supporting the rule. The theory of the law is that credit is given to the identical building for which the materials are furnished or upon which the work is done. Each building represents a distinct and separate security. One building can not be made to stand as the security for another. In truth, each building stands as a several debtor, and one can no more be made to discharge the debt of another building than one individual debtor can be made to pay a separate claim owing by somebody else to the same creditor. It is upon this principle that those cases may be sustained, which hold that a joint claim can not be supported by proof of a separate right. *Gorgas v. Douglas*, 6 Serg. & R. 512; *Morris Co. Bank v. Rockaway, etc., Co.*, 1 C. E. Green, 150; *Barker v. Maxwell*, 8 Watts, 478; *Chapin v. Perese, etc., Works*, 30 Conn. 461; *Landers v. Dexter*, 106 Mass. 531.

The complaint in the case before us shows notices against at least three separate parcels of real property, a mill, a distillery, and one hundred and forty acres of land, and therefore falls bodily within the rule.

The correct practice would have been to demur to the complaint, without moving to strike out. Where there is no personal liability, and the entire right of action depends upon the validity of the lien, which affirmatively appears to be invalid, the proper practice is to demur. *Lawton v. Case*, 73 Ind. 60. But where a right result is reached no

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harm is done, although an inappropriate remedy is adopted. Judgments are not reversed because of harmless errors.

We are not unmindful of the rule, that a complaint good in part will repel an attack by demurrer or motion. We fully recognize this rule. It affords appellants no assistance. The lien filed by one of them alone is void, because it is against separate parcels of property, and he has consequently no cause of action. But if he did have a cause of action the complaint fails. A complaint by one of several plaintiffs must show a cause of action in all. If it were conceded that the appellant, who separately filed a notice of lien, shows a cause of action in himself, it would not save the complaint. Having united in an action with others, whose notice of lien is bad, for two plain reasons, namely, because it is the joint notice of persons whose interests are distinct and several, and because it is directed against separate pieces of property, his cause must fall with theirs.

Judgment affirmed.

No. 8161.

WRAPE ET AL. v. HAMPSON.

PRACTICE.—*Suits By or Against Executors, Administrators or Guardians.—Parties as Witnesses.*—Under the first proviso in section 2 of the act of March 11th, 1867, defining who should be competent witnesses in all suits where a judgment might be rendered either for or against the estate represented by an executor, administrator or guardian, neither party was allowed to testify as a witness, unless required by the opposite party, or by the court trying the cause.

From the Jennings Circuit Court.

A. G. Smith, for appellants.

Howk, J.—In this action, Henry Hampson sued John

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Wrape and George W. Swarthout, administrator of the estate of James P. Swarthout, deceased. In his complaint, the appellee, Hampson, alleged in substance, that, on May 1st, 1875, he and one Henry Wrape were partners in business under the firm name of Wrape & Hampson, and, as such partners, were then engaged in the business of quarrying rock at Deputy, Indiana; that, on said May 1st, 1875, the appellee bargained and sold to said John Wrape and said James P. Swarthout, then in full life, all his interest, being the one equal half, in the business and effects of said firm of Wrape & Hampson, for the sum of \$500; that the appellee delivered the said interest to said John Wrape and James P. Swarthout, who took possession, and, in connection with said Henry Wrape, continued said business under the new firm name of Henry Wrape & Co.; that, by the terms of said sale, the said John Wrape and James P. Swarthout were to pay down the sum of \$200, and to pay Henry Wrape, for the appellee, the sum of \$100, and to pay the appellee the remaining \$200 six months after said May 1st, 1875, with interest, which said sum was due and wholly unpaid; and that, in 1878, James P. Swarthout died, and George W. Swarthout was the administrator of said decedent's estate. Wherefore, etc.

The cause was put at issue and tried by the court, and a finding was made for the appellee; and over the appellants' motion for a new trial, and his exception saved, the court rendered judgment against them for the appellee, upon its finding.

From this judgment the defendant John Wrape alone has appealed to this court, and his co-defendant has declined to join therein. The only error assigned by the appellant Wrape is the decision of the circuit court in overruling his motion for a new trial. The cause for a new trial, chiefly relied upon by the appellants' counsel for the reversal of the judgment below, was alleged error of law, occurring at the trial, in excluding the evidence of the appellant John Wrape, who offered himself as a witness for the defendants, "which

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evidence was material to the issue involved between the parties to this action."

There is no room for doubt in regard to the materiality of the facts which it was proposed to prove by the appellant John Wrape. Indeed, the offered evidence was not objected to on the ground either of its immateriality or of its irrelevancy. When the offer was made to prove certain recited facts by the evidence of said John Wrape, the bill of exceptions contains this statement: "To which offer and the competency of the said John Wrape, as a witness to testify in said cause, the said plaintiff and the defendant George W. Swarthout, administrator, objected, for the reason that the said John Wrape was not a competent witness, it being a case where an administrator was a party, and in which a judgment might be rendered for or against said estate,—which objections the court sustained, and refused to permit the said John Wrape to testify as a witness for himself in this action."

This decision of the trial court was clearly right, we think, under the law then in force in relation to the competency of witnesses. The case was tried on the 18th day of March, 1879, and at that time section 2 of the act of March 11th, 1867, "defining who shall be competent witnesses," etc., was the law of this State on the subject now under consideration. 2 R. S. 1876, p. 133. The act of March 15th, 1879, amendatory of said section 2 of the aforesaid act of March 11th, 1867, though approved three days before the trial of this cause, had no emergency clause or section, and did not take effect until the acts of 1879 had been "published and circulated in the several counties of this State by authority," and long after this case was tried. Acts 1879, p. 245.

The first proviso in said section 2 of the act of March 11th, 1867, in so far as it is applicable to the case now before us, reads as follows: "*Provided*, That in all suits where an executor, administrator or guardian, is a party in a case, where a judgment may be rendered either for or against the estate

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represented by such executor, administrator or guardian, neither party shall be allowed to testify as a witness unless required by the opposite party, or by the court trying the cause," etc. In the case at bar, the record shows that John Wrape was not "required by the opposite party" to testify as a witness, for his co-defendant, Swarthout, as well as the plaintiff, objected to him as a witness, on the ground of his incompetency. Nor can it be said that the court trying the cause required said John Wrape to testify, for the ruling complained of is that the court sustained the objections to the competency of said Wrape as a witness, and refused to admit his testimony as evidence. This statutory proviso is too plain and mandatory in its terms to require construction. Under the issues in the cause, a judgment not only might but must be rendered by the trial court, either for or against the estate of said James P. Swarthout, deceased, represented by the defendant George W. Swarthout, as such administrator. As the case is presented by the record before us, the statute in force at the time of the trial imperatively required the court to sustain the objections below to the competency of said John Wrape when offered as a witness, and to exclude his testimony as evidence.

The other causes for a new trial assigned by the appellant were, that the finding of the court was not sustained by sufficient evidence, and was contrary to law. We think, however, that the evidence in the record fully sustained the finding of the court, and, certainly, the finding was not contrary to law.

Our conclusion is, that the court committed no error in overruling the appellants' motion for a new trial.

The judgment is affirmed, at the costs of the appellant John Wrape.

McClellan *et al.* v. Binkley.

No. 8361.

McCLELLAN ET AL. v. BINKLEY.

PRACTICE.—Courts.—Proceedings in Fieri.—Motion for New Trial.—Notice.—The proceedings in a cause remain *in fieri* until the end of the term at which the motion for a new trial, though filed after judgment, is ruled upon, and in the mean time the court may alter, amend or set aside its former ruling, orders and judgment, without special notice to the parties.

SAME.—Mechanic's Lien.—Finding.—Judgment.—Collateral Attack.—In an action upon an account and to foreclose a mechanic's lien, there was a general finding for the plaintiff on which a personal judgment only was entered against the defendant. After the rendition of the judgment and at the same term of court, the defendant filed a motion for a new trial, which, at the next term, was overruled, and at a later day in the term, on motion of the plaintiff, without notice to the defendant, the court set aside its former judgment and entered a like personal judgment and a decree foreclosing the alleged lien.

Held, that this action was within the power of the court, and not erroneous. The judgment of the circuit court can not be questioned collaterally on the ground that it goes beyond and is not according to the finding.

From the Marion Superior Court.

G. H. Chapman, U. J. Hammond, N. R. Harrison, J. S. Tarkington and J. Buchanan, for appellants.

S. Claypool and W. A. Ketcham, for appellee.

WOODS, J.—Action by the appellee for the recovery from the appellants of certain real estate.

The court, at the request of one of the parties, stated its conclusions of law upon the facts specially found. It is not necessary, however, to give either a copy or synopsis of the finding. The single question presented and discussed is clearly stated, and, in our judgment, properly resolved, in the opinion of the Superior court, at general term. That opinion is as follows:

“On February 13th, 1877, an action was pending in this court wherein one Skinner was plaintiff, and one Buser was defendant. The action was to recover money due, and to foreclose a lien for certain materials furnished in the erection of a mill. On the date last mentioned, a verdict was returned

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in favor of the plaintiff. On February 16th, 1877, the court, of its own motion, rendered judgment upon the verdict, the judgment being simply a money judgment, not foreclosing the plaintiff's lien. On February 20th, the said defendant filed his motion for a new trial. On March 6th, 1877, the defendant's motion for a new trial was overruled. On March 13th, 1877, upon the plaintiff's motion, the judgment before entered in said cause was set aside and another judgment was entered, which was substantially like the first one, with the addition of the ordinary provisions foreclosing the plaintiff's lien. Of the plaintiff's said motion and the said corrections made in the second judgment, no notice was given to the said defendant.

"The question presented in this case is, whether the judgment entered on March 13th, 1877, was a nullity. The special term of this court held that it was not. * * *

"At common law the record was said to be in the breast of the judges as long as the proceedings were *in fieri*, and they were *in fieri* until the close of the term, at which final judgment was rendered. After that time there could be no alteration or amendment of the judgment, except for a correction of mere clerical mistakes or irregularities. *The Bank of the United States v. Moss*, 6 Howard (U. S.) 31. This would be so, under our practice, if a motion for a new trial could not, as it could not at common law, be filed after the rendition of the judgment. But, inasmuch as, under our practice, such a motion may be filed after the judgment, it follows in analogy with the authority above cited, that the proceedings must continue to be *in fieri* until the close of the term at which a final disposition is made of the motion for a new trial; and that until that time the court retains control of the whole record, with power to alter, amend or set aside its former rulings, orders and judgments.

"Here, it will be observed, the amendment made was not the correction of any judicial error, but was, in fact, nothing more than the correction of a clerical error—the error of the

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clerk in entering up simply a personal judgment, when, as shown by the record, the plaintiff was entitled, in addition, to a foreclosure of his lien. Everything necessary to amend by appeared of record, and it might be that the court, at a subsequent term, even if the motion for a new trial had preceded the final judgment, could have made the corrections. Freeman Judgments (2d ed.), sec. 70, *et seq.* However this may be, it clearly had the right to make the correction during the term at which the correction was in fact made. No notice to the defendant was necessary." See *Burnside v. Ennis*, 43 Ind. 411; *Spanagel v. Dellinger*, 34 Cal. 476.

The further point is made on this appeal, that the verdict, as stated in the special finding, was not a general verdict for the plaintiff, and did not warrant a decree foreclosing the lien, but only the personal judgment which was rendered in the first instance.

The finding states that "a verdict was rendered for the plaintiff in said cause for \$250." Whether, upon such a verdict as this is found to have been, the plaintiff was entitled to a foreclosure of his alleged lien, for the amount so found in his favor, may be debatable. We decide nothing on the point; but it being conceded, as we hold that it must be, that the record remained in the control of the court until the end of the term at which the motion for a new trial was determined, and that parties were bound during that term to take notice of the action of the court, it was a question within the jurisdiction of the court to decide whether the verdict was sufficient to support a decree of foreclosure, and the correctness of the decision can not be collaterally questioned.

Judgment affirmed, with costs.

ELLIOTT, C. J., absent.

Suman *et al.* v. Cornelius.

No. 8639.

SUMAN ET AL. v. CORNELIUS.

NEW TRIAL.—*Newly Discovered Evidence.*—*Diligence.*—An application for a new trial upon the ground of newly discovered evidence must show that the applicant used diligence to procure and present the evidence upon the trial, and that the evidence was of such a character as that it would probably produce a different result upon another trial.

SAME.—*Evidence.*—*Practice.*—The insufficiency of the evidence to sustain a finding and judgment can not be presented by a complaint for a new trial filed after the close of the term at which the judgment was rendered.

From the Delaware Circuit Court.

H. Craven, H. C. Ryan, B. Harrison, C. C. Hines and W. H. H. Miller, for appellants.

T. J. Blount and C. B. Templer, for appellee.

ELLIOTT, C. J.—The appellants' complaint seeks a new trial. It was filed after the close of the term at which the judgment was rendered. The court, after having heard the evidence, decided against the appellants, and this decision ought to be affirmed.

In applications for a new trial, upon the ground of newly discovered evidence, the applicant must show that he used diligence to procure and present the evidence upon the trial. He can not take the chances of a trial, and, after an adverse decision, vex his adversary and take up the time of the court by a second trial, without showing that the absence of the evidence was not owing to his want of care and vigilance. The evidence in the case at bar satisfies us that the appellants did not make use of proper diligence to discover and present the evidence now relied upon as entitling them to a new trial. *Reno v. Robertson*, 48 Ind. 106; *Bowman v. Clemmer*, 50 Ind. 10; *Arms v. Beitman*, 73 Ind. 85.

It is essential that the newly discovered evidence should be of such a character as that it would probably produce a different result in case a new trial should be granted. We have looked carefully through the evidence given upon the first

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trial, and through that adduced for and against the appellants' application, and we think it clear that the newly discovered evidence would not have changed the result of the litigation.

It is suggested that, upon the evidence delivered on the first trial, the finding and judgment were erroneous. This is a question which can not be presented by a complaint for a new trial filed after the close of the term. Such questions may be presented by a motion filed during the term, but not by an application filed after the close of the term at which the judgment was rendered.

Judgment affirmed.

 No. 7169.

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78	507
150	432

PRACTICE.—Suppressed Depositions.—Harmless Error.—Where depositions have been suppressed and the ruling is complained of as erroneous, the error, if any, will be considered harmless, when the record shows that the suppressed depositions were read in evidence, on the trial, by the complaining party.

SAME.—Appeal by Plaintiff.—When Judgment Affirmed.—When the plaintiff appeals and the record shows he has no cause of action against the defendant, intervening errors, if any, must be regarded as harmless, and the judgment below must be affirmed.

EXECUTORY CONTRACT FOR SALE OF GOODS.—Delivery or Offer to Deliver to Vendee.—Failure to Accept.—Measure of Damages.—In all cases of contracts for the sale of personal property which has any market value, the vendor must deliver the property to the vendee, or must do such acts as will vest the title to such property in the vendee, or as would have vested the title in him if he had consented to accept such property, before such vendor can maintain an action against the vendee for the recovery of the contract price, or any part thereof; and in such an action, the measure of the vendor's damages, as a rule, is the difference between the value of the property at the time of the vendee's refusal to accept it and the contract price.

From the Wayne Circuit Court.

Fell et al. v. Muller.

C. C. Binkley, for appellants.

W. A. Bickle, for appellee.

Howe, J.—This suit was commenced by the appellants, as plaintiffs, against the appellee, as defendant, before a justice of the peace of Wayne county. The trial of the cause before the justice resulted in a judgment for the appellants, from which judgment the defendant below appealed to the circuit court. There the cause was tried by the court and a finding was made for the appellee; and the appellants' motion for a new trial having been overruled, and their exception saved to this ruling, the court rendered judgment against them, on its finding, for the appellee's costs.

The following decisions of the circuit court have been assigned by the appellants as errors in this court:

1. In sustaining the appellee's motion to suppress the first deposition of William J. Fell, taken May 20th, 1874;
2. In sustaining appellee's motion to suppress the second deposition of William J. Fell, taken August 12th, 1874;
3. In suppressing the deposition of Thomas E. Taylor;
4. In suppressing questions 5, 6 and 7, and the several answers thereto, in the deposition of William J. Fell, taken August 12th, 1874, and questions 5, 6 and 7, and the answers thereto, in the deposition of Thomas E. Taylor, taken on the same day; and,
5. In overruling their motion for a new trial.

The suit was brought upon a written contract, which reads in substance, as follows:

"Whereas, C. J. Fell & Brother, of Philadelphia, Pa., hold a claim against Bernard Muller, of Richmond, Indiana, for \$266.40, as follows:"

(Here follows a bill for "yeast powders," less certain percentage and allowances.)

"And, on the 10th of September, 1872, C. J. Fell & Brother drew on said Muller for \$266.40, to their own order, endorsed to and presented by C. F. Reeves, cashier First

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National Bank, Richmond, Ind., which was not accepted or paid by Muller, because he claimed that said goods did not give satisfaction. Now, in settlement of these matters, Muller agrees to and with C. J. Fell & Brother to deliver back to them, prepared for shipping, at the railroad depot in Richmond, Ind., all the above named goods, except about one-half gross sold, and he further agrees that he will, between this and the 5th day of June, 1873, buy from them the full amount of said \$266.40 of their goods, such as they keep quoted in their price-list, and at regular prices, and pay for the same, and when this is all done and completed, then it is agreed between said parties, that said claim is fully paid and satisfied, and all matters between them shall be considered fully adjusted. Dated, March 22d, 1873." (Signed) "C. J. Fell & Brother, by C. C. Binkley, their attorney."

"B. MULLER."

In their complaint, the appellants alleged, among other things, that the appellee had wholly failed, neglected and refused to perform his part of said contract, in this, that notwithstanding the appellants, during all the time between March 22d, 1873, and June 5th, 1873, and from that time until the commencement of this action, had kept large quantities of goods and a regular price-list thereof, a copy of which price-list was furnished to appellee, on March 22d, 1873, and at divers times since, yet the appellee had not, at any time since the execution of said contract, bought or offered to buy from the appellants the full amount of said \$266.40, or any part thereof, of their goods so kept and quoted in their said price-list, but had wholly failed, neglected and refused so to do; and that, during all that time, the appellants were ready, willing, able and prepared to sell said goods to appellee at regular prices.

The appellants averred that the profits to them in the sale of said goods, at regular prices, at all times during the time above mentioned, would have been ninety-five dollars on said

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sum of \$266.40, and that said profit remained due and unpaid. Wherefore, etc.

The principal ground relied upon in argument, by the appellants' counsel, for the reversal of the judgment below, is the alleged erroneous decisions of the trial court in suppressing certain depositions and parts of depositions taken in the cause. The record shows that the court, at its November term, 1874, sustained the appellee's motions to suppress the appellants' depositions; to which rulings they excepted and filed their bill of exceptions. Afterwards, on the 19th day of June, 1875, and after the court on the trial of the cause had found for the appellee and rendered judgment accordingly, the appellants filed a second bill of exceptions, purporting to contain the evidence given on the trial. In this bill of exceptions it is shown that the first evidence introduced by the appellants was the suppressed "depositions of Jenks Fell and Joseph E. Taylor." It would seem, therefore, that the appellee had probably waived or withdrawn his objections to the depositions, at least, so far as to allow them to be introduced in evidence.

The rulings of the court, in suppressing the depositions, even if erroneous, would therefore be harmless errors, and not available for the reversal of the judgment.

The real question for decision in this case would seem to be this: Did the appellants' complaint state a cause of action in their favor against the appellee? If it did not state a valid or sufficient cause of action against the appellee, and we think it did not, then it is clear that the appellants were not harmed by any of the rulings of the trial court adverse to them, and the judgment below must be affirmed. For in section 101 of the civil code of 1852, in force at the time of trial, and still in force as section 137 of the civil code of 1881, it is provided in substance, that no judgment can be reversed or affected by reason of any error or defect in the proceedings, which does not affect the substantial rights of the adverse party. So, in section 580 of the civil code of 1852, re-enacted and now in

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force as section 659 of the civil code of 1881, the following provision is found: "Nor shall any judgment be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below."

If the written instrument, upon which the appellants' complaint is founded, was a mere *nudum pactum* on the part of the appellee, resting upon an insufficient consideration, it is clear, we think, that his mere failure or refusal to comply with his part of the written contract would not give the appellants a cause of action against him for the recovery of their alleged profits under the contract. The contract is peculiar in its terms. It recites that the appellants had held a claim of a certain amount against the appellee for "yeast powders," which claim he refused to pay, "because he claimed that said goods did not give satisfaction." It is then provided, that, "in settlement of these matters," the appellee agreed to deliver back the said goods to the appellants, at the railroad depot in Richmond, and that, between March 22d and June 5th, 1873, he would buy from them the full amount of \$266.40 of their goods, such as they kept quoted in their price-list, at regular prices, and pay therefor. It may be said, we think, that the contract shows upon its face that it was executed by the appellee "in settlement," or by way of compromise, of a claim which the appellants held against him, and such a settlement may properly be regarded as a sufficient consideration for the execution of the contract, "for the law favors the settlement of disputes." 1 Parsons Contracts, 438.

But, conceding that the appellee's contract rests upon a sufficient consideration, the question remains, Have the appellants stated sufficient facts, in their complaint, to show that they had sustained any legal damages by the alleged breach of such contract on the part of the appellee. It will be observed that the only breach of the contract assigned by the appellants is, that the appellee had not, at any time since his execution of said contract, bought or offered to buy from them

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the full amount of \$266.40, or any part thereof, of their goods kept and quoted in their said price-lists, but had wholly failed, neglected and refused so to do, and that, during all that time, they were ready, willing, able and prepared to sell said goods to appellee, at regular prices. This breach of the contract is supplemented by the averment that the profit to the appellants, in the sale of said goods at regular prices, at all times during the time mentioned in the complaint, would have been \$95 on the said sum of \$266.40, and that the said profit remained due and unpaid. The complaint shows that the appellants were ready and willing to perform, but does not aver that they offered to perform, their part of the contract. Ordinarily, in such a case as this, the averment of an offer to perform, on the part of the plaintiffs, would be a material and necessary averment.

But the most serious difficulty with the appellants' complaint, in the case at bar, lies in this, that it wholly fails to allege such facts as would enable the court and jury to determine what damages, if any, they had sustained by reason of the appellee's alleged breach of the contract in suit. In other words, the complaint fails to allege the difference, or that there was any difference, between the contract price and the market value of the goods, at the time and place when and where the appellee, under the contract, should have bought and accepted them. The rule for the measure of damages, in such a case, is thus stated in Chitty on Contracts, 11th Am. ed., p. 1331: "In an action for not accepting goods, the measure of damages is the difference between the contract price and the market price, on the day when the vendee ought to have accepted the goods."

In *The Pittsburgh, etc., Railway Co. v. Heck*, 50 Ind. 303, after quoting with approval the rule thus laid down by Mr. Chitty, this court said: "It is conceived that in all cases of contracts for the sale of personal property, where it has any market value, the vendor, before he can recover of the vendee the contract price, must have delivered the property to the

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vendee, or have done such acts as vested the title in the vendee, or would have vested the title in him, if he had consented to accept it; for the law will not tolerate the palpable injustice of permitting the vendor to hold the property and also to recover the price of it."

In the case now before us, the appellants are seeking to recover thirty-five per cent. of the contract price of their goods, which percentage they call their profit under the contract, without delivering or offering to deliver the goods, or any part thereof, to the appellee, and without having done any acts which would vest the title in the appellee to the goods, or to any part or percentage thereof. It seems to us that, upon the facts of this case as stated in their complaint, the appellants could not, in any event, recover more than merely nominal damages; and certainly we know of no rule of law which would enable them, upon the facts stated, to recover as damages the alleged profits for which they sue.

The facts in this case are, in many respects, similar to the facts in the case of *Ganson v. Madigan*, 13 Wis. 75. In that case the court said:

"Where the vendor has actually taken all the steps necessary to vest the title to the goods sold in the vendee, he may sue for goods sold and delivered, and the rule of damages would be the contract price. But where he is ready and willing to perform, and offers to do so, but the vendee refuses, even though the title is not vested in the vendee, the vendor still has his action on the contract for damages. But the rule of damages in such case would be the actual injury sustained, which is ordinarily the difference between the value of the property at the time of the refusal, and the price agreed on. Chitty on Con. 384; 1 Chitty's Pl. 347; 2 Parsons on Con. 484, note *h*; *Thompson v. Alger*, 12 Met. 428; *Allen v. Jarvis*, 20 Conn. 38; *Girard v. Taggart*, 5 S. & R. 19."

As we have seen, the appellants have not shown in their complaint such necessary facts as would enable the court or

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jury to determine the question as to whether or not they had sustained any damages, and if so how much, by reason of the alleged breach of the contract in suit by the appellee. The evidence in the record, consisting chiefly of the depositions of the appellants, failed to show that they had sustained any damages by reason of the appellee's breach of the contract sued upon; because it failed to show any difference between the contract price of the goods, referred to in the contract, and the market value of such goods, at any time between the date of such contract and the commencement of this suit.

Upon the whole case, we are of the opinion that the court committed no error in overruling the appellants' motion for a new trial.

The judgment is affirmed, at the appellants' costs.

No. 8451.

FLANAGAN v. PATTERSON, ADM'R.

PRACTICE.—*Relief from Judgment.*—*Excusable Neglect.*—*Complaint.*—A complaint for relief from a judgment, under section 396, R. S. 1881, which shows that the party had a good defence capable of proof, and that because of sickness of a member of the family, and the change, without his knowledge, of the hour of convening court, he did not reach court with his witnesses until the cause had been tried, is good on demurrer.

SAME.—*Statute Construed.*—The relief provided by section 396, R. S. 1881, is not confined to judgments by default. *Nelson v. Johnson*, 18 Ind. 329, distinguished.

From the Hamilton Circuit Court.

D. Moss and *R. R. Stephenson*, for appellant.

T. J. Kane and *T. P. Davis*, for appellee.

NEWCOMB, C.—The appellant filed, on October 15th, 1879, her verified complaint, under section 99 of the code of prac-

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tice, praying to be relieved from a judgment rendered against her in favor of the appellee.

The original action was on a promissory note executed by James W. Flanagan and the appellant, by the latter as surety of the former; and her defence was, that an extension of time had been given by the payee to the principal debtor, for a valuable consideration, without the knowledge or consent of the surety, the payee knowing that she was a surety only on the note.

The grounds for relief from the judgment are stated substantially as follows in the complaint:

That the cause being at issue was set down on the court calendar for trial on September 24th, 1879; that appellant had duly notified her witnesses to be present on that day; that she was 62 years of age and feeble of body, and resided eight miles from the court house; that she could not leave home to attend the trial until the morning of September 24th, owing to the serious illness of her son, who was fatally sick with consumption; that she left her home, with her witnesses, for the court house at 7 o'clock A. M., on September 24th, but owing to heavy roads, occasioned by a rain the night previous, she did not reach the court room until about 9 o'clock A. M., when she learned that the cause in which she was such defendant had been called a half hour before, and had been tried in the absence of herself and her witnesses, and decided against her; that until one week before said day it had been the custom of said court to commence its morning sessions at 8:30 o'clock, but that, without the knowledge of appellant, the hour had been changed to 8 o'clock, and that she was ignorant of said change until her arrival at the court house on the morning of September 24th; and had the hour of meeting not been so changed she would have been present with her witnesses at the calling of the cause for trial.

As to the merit of her answer in the original cause, the complaint avers that "she has a good and meritorious defence to said action, in this, that she can and will prove that all the

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allegations in her said answer are true, which answer is now on file in this cause, and to which reference is made."

The court, on motion of the appellee, struck out a part of the complaint and sustained a demurrer to the residue, and there was judgment on the demurrer for the appellee.

Errors are assigned on both of said rulings.

We think that the complaint makes a sufficient showing of diligence on the part of the appellant in her efforts to reach the court in time for the trial, and of surprise by reason of the recent change in the hour for the convening of the court.

But it is objected by the appellee that section 99 is applicable only to cases where judgments have been rendered by default, and that inasmuch as the defendant's attorneys were present at the trial, and failed to withdraw the answer of the defendant, she was concluded by their acts, and can not have relief under said section. In support of this position counsel cite *Nelson v. Johnson*, 18 Ind. 329. In that case, PERKINS, J., in speaking of section 99 of the code, said: "This section seems to have reference to cases in which the ground of relief is limited to the act of taking or rendering the judgment, as in cases of default, and does not look to errors which occur during the progress of a cause where both parties are present in court." We think the case at bar is one in which the ground of relief is limited to the act of taking or rendering the judgment, because it may be presumed that if the court, when the case was called, had known that this aged lady had, at an early hour of the morning, left the bedside of her sick son, and was then using all reasonable diligence to be present with her witnesses at the trial, and that she was unaware of the change of the morning hour of the court from 8:30 to 8 o'clock, the trial would have been suspended until, by the exercise of reasonable diligence, the defendant and her witnesses could reach the court house. The complaint does not allege that any error was committed by the court in the trial of the cause, nor claim relief on that ground. The court and counsel acted without knowledge of the facts on

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which relief is prayed. We think the case comes fairly and clearly within the terms of section 99. Its language is, that the court "shall relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise, or excusable neglect, * * * on complaint or motion filed within two years." If the cause for relief exists, the manner in which the judgment is taken is a matter of minor consequence.

The complaint shows that the appellant had a good defence to the original action. Her case in this particular is as strong as even those of the defendants in *Frazier v. Williams*, 18 Ind. 416, *Edsall v. Ayres*, 15 Ind. 286, and *Hunter v. Francis*, 56 Ind. 460, in all of which relief was granted. The court erred in sustaining the demurrer to the complaint.

There is no available error in the action of the court in striking out a part of the complaint. The portion stricken out was an excuse for not making the application for a new trial during the term, but, as the appellant had two years by the statute within which to apply for relief, she was under no legal obligation to move at the term at which judgment was rendered.

For error in sustaining the demurrer to appellant's complaint, the judgment below ought to be reversed.

PER CURIAM.—It is therefore ordered on the foregoing opinion, that the judgment below be, and the same is hereby, reversed, at the costs of the appellee as such administrator, and that said cause be remanded to the Hamilton Circuit Court, with instructions to overrule the demurrer to the appellant's complaint.

No. 7157.

WAGNER v. GOLDSMITH.

NEGLIGENCE.—*Damages*.—A team of horses attached to a heavy wagon, having been left by the defendant in a public street near a railroad track,

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hitched by the lines only to the lever of the rubber-block, escaped from his control and ran away, and, in so doing, ran over and against and destroyed the plaintiff's scales, without the latter's fault.

Held, that the defendant was guilty of such negligence as made him liable, in damages, for the destruction of plaintiff's scales.

From the Decatur Circuit Court.

J. S. Scobey, for appellant.

C. Ewing and *J. K. Ewing*, for appellee.

Howk, J.—This suit was commenced by the appellant against the appellee, before a justice of the peace of Decatur county, in a complaint of two paragraphs. In the first paragraph the appellant alleged in substance, that, on the 15th day of June, 1877, he was the owner and proprietor of a pair of hay and stock scales, situate in the town of Osgood, Indiana, of the value of \$200; that the appellee was then and there in the possession and had the management and control of two horses harnessed to a heavy wagon; that said team was then and there standing in a street in said town of Osgood, under the appellee's management and control; that the appellee then and there so carelessly managed the said team, that, through his carelessness and negligence, the said team became frightened and ran away and against, and struck with great force, the appellant's said hay and stock scales, and then and thereby crushed, broke in pieces and greatly damaged the said scales, so that they were then worthless, to his damage in the sum of \$200. Wherefore, etc.

The second paragraph of the complaint differs from the first paragraph only in alleging that the scales were situate on the appellant's real estate in said town of Osgood, at the time they were so broken in pieces and damaged by the appellee's team.

The trial of the cause by a jury, before the justice, resulted in a verdict and judgment for the appellee. On appeal to the circuit court, a demurrer was sustained to the second paragraph of the complaint, and the cause was tried by the court upon the first paragraph of the complaint, and a finding was made for the appellee, the defendant below. Over the appel-

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lant's motion for a new trial, and his exception saved, the court rendered judgment against him for the appellee's costs.

In this court, the only error assigned by the appellant is the decision of the circuit court in overruling his motion for a new trial. In this motion the following causes for such new trial were assigned by the appellant:

1. In the admission, over his objections and exceptions, of each and every part of John Emmert's evidence, and in not sustaining his objections to the questions to said witness.
2. In not rejecting said Emmert's evidence on his motion.
3. In the admission, over his objections and exceptions, of John Drake's evidence, and in not sustaining his objections to the several questions put to said witness;
4. In not rejecting said Drake's evidence on his motion;
5. The finding of the court was contrary to law; and,
6. The finding of the court was not sustained by the evidence.

The real question for decision in this case, as made by the evidence, as it seems to us, may be thus stated: Was the appellee in fault in suffering his team to escape from under his control and management, under all the circumstances of the case? If he was, then he ought to be held liable for such damages resulting directly from such fault, as the appellant may be shown to have sustained. But if the appellee was not in fault, if the injury complained of was unavoidable and the conduct of the appellee was free from blame, then he ought not to and will not be held liable for the resulting damages. There is but little, if any, conflict in the evidence, as it appears in the record, except as to the probable value of the appellant's scales. In our opinion the evidence clearly showed that the appellee's team, through his fault and negligence, escaped from his control and ran away, and, in so doing, they ran over and against the appellant's scales and broke them in pieces. The appellee had hitched his team by the lines only to the lever of the rubber-block, on the near side of his wagon, about ten feet from the railroad switch. He

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was on the off-side of his wagon, between it and the switch, about ten feet from his team, and engaged in conversation.

On the main track of the railroad, and about fifty feet from the appellee's horses, a locomotive had stopped or was standing; and the noise made by the engine in blowing off its surplus steam frightened his team and caused it to run away, as alleged in the complaint. When the engine stopped so near to his team, or soon after, the appellee was told that "he had better attend to his horses, for they might run away;" but he did not heed the advice, although he heard it, as was shown by his own evidence. From the evidence in the record, it can not be said, we think, that the running away of the appellee's team, and the injury thereby done to the appellant's scales, was purely the result of casualty or accident. On the contrary we are of the opinion that the evidence fairly showed that the running away of the appellee's team, and the consequent injuries to the appellant's scales, were the direct result of the fault and negligence of the appellee. Under the circumstances of this case, it would seem to be clear that the appellee was not exercising ordinary care, skill and diligence in the control and management of his horses, at the time they became frightened and ran away. Herein lies the material difference between the case at bar and the case of *Brown v. Collins*, 53 N. H. 442. In the case cited there will be found an able and exhaustive examination of the authorities, English and American, upon the subject now under consideration; from which the doctrine is deduced, that if in such a case the defendant is in fault, he must respond in damages for such injuries as result directly from such fault or negligence. *Brown v. Kendall*, 6 Cush. 292; *Bennett v. Ford*, 47 Ind. 264.

The court erred, we think, in overruling the appellant's motion for a new trial.

The judgment is reversed, at the appellee's costs, and the cause is remanded with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

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No. 8762.

HAMILTON ET AL. v. HUNTLEY ET AL.

FIXTURES.—*Mortgage.*—A., in possession, but not the owner, of a flouring mill, was permitted by the manufacturers of machinery to put into and annex to it, in such a temporary manner as to admit of removal without injury to the mill, certain machinery which, if found satisfactory, after sixty days' trial, was to become his property upon giving his notes for the price and notice of his acceptance of the machinery. The mill and real estate were, at the time, subject to two mortgages. A. refused to accept the machinery or give his notes as he had agreed, and when he quit possession the machinery remained in the mill, a tenant taking possession. *Held*, that, as between the manufacturers and the mortgagees, the machinery was part of the real estate, and subject to the mortgages. Woods, J., dissents.

PLEADING.—*Answer.*—A bad answer is sufficient for a bad cross complaint.

From the Shelby Circuit Court.

T. B. Adams and *L. T. Michener*, for appellants.

E. P. Ferris, *A. F. Wray* and *H. H. Daugherty*, for appellees.

BICKNELL, C. C.—Peyton Johnson and wife, in February, 1877, mortgaged land, including a mill and its appurtenances, to Kennedy and Robertson, to secure several notes payable to them, and made by Peyton Johnson. These notes became the property of the appellant Hamilton, by endorsement.

The same grantors, in February, 1878, mortgaged the same land to the appellant Hamilton, to secure a note payable to him and made by Peyton Johnson.

Hamilton brought suit upon the notes and mortgages and obtained a judgment of foreclosure against Johnson and wife.

Thereupon the appellees, Huntley, Holcomb and Heine, were made defendants, and they filed a cross complaint against Hamilton, Johnson and wife, and Kennedy, alleging that after the execution of said notes and mortgages, and before suit was brought thereon, they delivered to Peyton Johnson a middling purifier, and a bran duster, and a brush machine, to be put by him in said mill and used on trial, and, if found satisfactory, then within sixty days after such delivery Peyton should notify them of his acceptance of the machines and give

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them his notes therefor, and then said machines should become his property; that said machines are fastened to the floor of the mill temporarily by cleats and nails, and can be removed without injury to the building or freehold; that they were not attached to the building or the realty in any permanent manner by or with the knowledge or consent of the cross complainants, but were only temporarily attached by said Peyton for the purpose of testing their value, and that their removal will not render the freehold and mill less valuable than when the mortgages were given; that said Peyton, although said sixty days long ago expired, and although often requested, has failed and refused and still refuses to accept said machines and execute said notes, and the machines belong to said cross complainants; that said mill property is now in possession of said Kennedy, as tenant of said Minerva Johnson, its owner, and said Kennedy, on demand, has refused to deliver said machines to said cross complainants.

The prayer of the cross complaint is, that the said machines be excepted from the decree of foreclosure and declared to be the property of the cross complainants, and that said Hamilton and the Johnsons and Kennedy be enjoined from claiming any right to the machines, or the use thereof, and for all other proper relief.

Hamilton filed a demurrer to this cross complaint, and the same was overruled.

The said Hamilton, Minerva Johnson and Kennedy answered the cross complaint jointly, alleging that the said land and mill belonged to said Minerva in fee simple; that the mill is a three-story brick building, on stone foundations eight feet deep, with a steam engine and boiler in a brick and stone bed, and permanently attached to the building and machinery; that the machinery is fastened to the building permanently by rods, bolts, pulleys, bands, screws and other fastenings; that the same was not placed in said mill for trade, but to be used and enjoyed permanently as a part of said real estate; that said Peyton held said property as tenant of said Minerva, from Feb-

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ruary 10th, 1877, to February 1st, 1879; that during his tenancy he, without the knowledge or consent of the respondents, procured the said machines, fastened them to the floor by cleats and nails, and to the ceiling and joists by nails and braces, and connected them with the other machinery of the mill by belts, pulleys, elevators, chutes and large screws; that said machines were thus attached to the mill by said tenant, during his tenancy, and without the consent of the respondents, and were continuously used by him until the end of his tenancy, and were then delivered up with the mill to the said Minerva Johnson, who rented said property to said Kennedy, who now holds the same as such tenant, and is in daily use of said machines, without which the mill can not be properly used; that these respondents had no notice of the claim of the cross complainants. The answer then alleges the execution of the notes and mortgages mentioned in the original complaint, and that, at the time of the execution of said second mortgage, said Hamilton had no notice of the cross complainants' claim upon said machines; that said machines were attached to the mill when the said notes of Robertson and Kennedy were assigned to said Hamilton, who then had no notice of said cross complainants' claim.

The cross complainants filed a demurrer to this answer; said demurrer was sustained, and the respondents declining to answer further, judgment was rendered against them upon the cross complaint, that the said machines were the property of said Huntley, Holcomb and Heine, and were not covered by said mortgages or by the said decree of foreclosure.

From this judgment the said Hamilton, Kennedy and Peyton Johnson appealed; the said Minerva Johnson refused to join in the appeal; her name is stricken from the record.

The appellants assign errors:

1st. Overruling the demurrer to the cross complaint.

2d. Sustaining the demurrer to the answer to the cross complaint.

Personal property may be annexed to the freehold so as to

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become a part of it, although the annexation be made by mistake merely. *Seymour v. Watson*, 5 Blackf. 555. Or by a wrongful act. *Ricketts v. Dorrel*, 55 Ind. 470. And without permanent insertion, the annexation, apparently, resulting more from the intention of the party and the nature and uses of the property than from the mode of uniting, and the property becoming part of the realty, although capable of easy removal without substantial injury to the freehold. And there are constructive fixtures, which, in ordinary understanding, make part of the land or building; such are rails on a fence, stones in a wall, and Venetian blinds and locks and keys of a house. 2 Kent Com. 347, note *a*.

At common law, ordinarily, subject to some exceptions, as between landlord and tenant, in favor of trade, whatever is annexed to the freehold becomes part of it, and can not afterwards be removed, except by him who is entitled to the inheritance. *Van Ness v. Pacard*, 2 Pet. 137, 142.

In the United States, the modern cases exhibit a conflict of opinion as to fixtures.

In Connecticut, it was held that a simple annexation to the realty is not sufficient, and that, to become a fixture, the chattel must be so annexed that an injury to the freehold will result from the mere act of removal, independently of the subsequent want of the thing removed. *Swift v. Thompson*, 9 Conn. 63. In Maine, it was held that where machinery is essential to the purposes for which a building is employed, it must be considered as a fixture, although only attached to other machinery, and not to the premises themselves, and capable of being removed without immediate or physical injury of any sort. *Farrar v. Stackpole*, 6 Greenl. 154. To the same effect are the Pennsylvania cases. *Voorhis v. Freeman*, 2 Watts & S. 116; *Pyle v. Pennock*, 2 Watts & S. 390. But in New York it was held, that, in order to constitute a fixture, adaptation to the enjoyment of the realty and annexation thereto must concur, although where the former exists

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the slightest fastening will be sufficient to constitute the latter. *Walker v. Sherman*, 20 Wend. 636.

In Indiana, the New York opinion seems to prevail, and there is no conflict in the cases.

In *Taffe v. Warnick*, 3 Blackf. 111 (23 Am. Dec. 383), it was held that a carding machine in a carding house, standing on the floor in its usual place of operation, but not fastened at all to the building, was not a fixture. In *Sparks v. The State Bank*, 7 Blackf. 469, it was held that a steam engine in a tanyard, for the purpose of tanning, which could be removed without injury to the building, being connected therewith by braces, was a fixture, and passed to the mortgagee of the land where it stood. It was held in this case that the exceptions as to a tenant in favor of trade were not applicable; that the rule as between heir and executor, vendor and vendee, and mortgagor and mortgagee, is the same, and that, in such cases, such fixtures pass with the land, though erected for the purposes of trade. In *Taffe v. Warnick*, *supra*, it was held, that, as between debtor and creditor, the same rule applies as between landlord and tenant. In *Millikin v. Armstrong*, 17 Ind. 456, it was held that personal property, used in and attached to a starch factory, will pass by a mortgage of the freehold. In *Bowen v. Wood*, 35 Ind. 268, the court went a step further, and held that machinery put in a mill after the execution of a mortgage, to supply the place of old and worn-out articles, becomes a part of the realty, and is subject to the mortgage. In *Pea v. Pea*, 35 Ind. 387, it was held that a steam saw-mill and machinery pass by a conveyance of the land on which the mill stands; and a like ruling was made in *Kennard v. Brough*, 64 Ind. 23, as to a sorghum mill. In *Cromie v. Hoover*, 40 Ind. 49, it was held, that buildings erected on leased land by a tenant, for the better use and enjoyment of the property, may be removed by him before the expiration of his lease, provided that can be done without permanent injury to the freehold. To the same effect are *Allen v. Kennedy*, 40 Ind. 142, and *McCracken v. Hall*, 7 Ind. 30. It is also

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held in Indiana, that the question, whether chattels annexed to real estate become part of it, may be determined by the contract of the parties. Thus, in *Frederick v. Devol*, 15 Ind. 357, where A. held a mortgage on real estate and a machine shop, and B. held a subsequent mortgage on the patterns, tools and movable fixtures in said shop, and the second mortgagee claimed said tools, etc., and the first mortgagee pleaded his prior mortgage, and the reply averred an agreement between the mortgagor and the first mortgagee that the tools, patterns, etc., should not be included in said first mortgage, it was held that the reply was good. And in *Yater v. Mullen*, 24 Ind. 277, where A. built a mill on B.'s land, under a contract that if B. would pay off a judgment and convey to A. half of the land, then B. should own half of the mill, and that until then the mill should remain the property of A., it was held, that, after the sale of the land on an execution against B., the mill was A.'s personal property, and that he might remove it. So, in the case of *Pea v. Pea*, *supra*, it was held that the legal effect of a deed might be controlled as to fixtures by the parol agreement of the parties, at the time of making the deed. And in *Taylor v. Watkins*, 62 Ind. 511, it was held that where there was a mortgage of land, on which was a steam saw-mill, boiler and engine, a complaint against the mortgagee, alleging that the mortgage did not include and was not to include said mill, etc., was sufficient to put the mortgagee upon his defence, and was good on demurrer. And in *Griffin v. Ransdell*, 71 Ind. 440, it was held, that although a dwelling-house is, ordinarily, part of the land on which it stands, yet a valid contract may be shown, between the owner of the land and the claimant of the house, by which the presumption that the dwelling-house is real property, may be rebutted. It has also been held in Indiana, that, where the owner of fixtures has a right to remove them, they are liable to be taken on execution and sold as his property. *State, ex rel., v. Bonham*, 18 Ind. 231.

It appears from the cross complaint that the real owner of

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the mortgaged property, in the case at bar, was Minerva Johnson, and that Peyton Johnson, at the time the machinery in controversy was annexed to the mill, "was in possession of said mill and using and running the same," and that said machinery was annexed to the mill by said Peyton Johnson, after the execution of the mortgages. There is no averment that Minerva Johnson, the owner of the land, or Hamilton, the mortgagee, had notice of the alleged agreement between the cross complainants and Peyton Johnson in reference to the machinery. It is not stated whether Peyton Johnson's possession of the mill was rightful or wrongful, nor whether he was in as tenant or otherwise.

Upon such a showing, it follows from the cases hereinbefore cited, that the machinery was subject to the mortgage.

If Peyton Johnson was a tenant, the rule, as we have seen, is that a tenant may remove such machinery during his term, but not afterwards; but the cross complaint shows that the cross complainants permitted the machinery to remain in the mill long after the sixty days allowed for trial had expired, and long after Johnson's possession had ended, and after the premises had been rented by Kennedy, and the mill and machinery delivered up to him.

The alleged contract between the cross complainants and Peyton Johnson did not bind Hamilton, the mortgagee. The cases hereinbefore cited, which hold that the legal rule as to fixtures may be modified by the contract of the parties, apply only when the contract is made by the party who, without such contract, would be entitled to the personal property as part of the real estate. There was no cause of action in the cross complaint, and the court erred in overruling the demurrer to it.

As to the answer to the cross complaint, it need not be specially considered, because a bad answer is good enough for a bad complaint. *Atna Ins. Co. v. Baker*, 71 Ind. 102. But it shows that Peyton Johnson was only a tenant; that he annexed the machinery without the knowledge or consent of the defendants; that at the end of his tenancy he delivered up the

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mortgaged premises with said machinery permanently annexed thereto, and that defendants had no notice of the cross complainants' claim; that said machinery had already been so annexed at the time when Hamilton took the assignment of the notes secured by the first mortgage, and remained so annexed at the date of the execution of the second mortgage; and that Hamilton took both notes and mortgage, without any notice of said alleged contract with Peyton Johnson. The answer shows still more conclusively than the cross complaint, that the machinery is subject to the mortgage. The court erred in overruling the demurrer to the cross complaint and in sustaining the demurrer to the answer to the cross complaint, and the judgment of the court below upon the cross complaint ought to be reversed, with instructions to sustain the demurrer to the cross complaint.

PER CURIAM.—It is therefore ordered by the court, upon the foregoing opinion, that the judgment of the court below upon said cross complaint be, and the same is hereby, in all things reversed, at the costs of the appellees, and this cause is remanded, with instructions to the court below to sustain the demurrer to the cross complaint.

WOODS, J., dissents.

78	528
120	224
78	528
153	90

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GOSS ET AL. v. MEADORS, GUARDIAN.

EJECTMENT.—*Sheriff's Sale.*—*Description.*—A defendant in an action of ejectment, who claims title through a sheriff's sale, can not maintain it unless the sheriff's deed describes the land in dispute.

SAME.—*Evidence.*—*Forcible Entry and Detainer.*—In such action it is not necessary for the plaintiff to prove a forcible entry and detainer.

SAME.—*Power of Attorney.*—A power of attorney, executed by A. to B., authorizing the latter to lease, mortgage or sell the land of the former in

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order to pay his debts, does not authorize the latter to take and hold possession of the land in opposition to the former's wishes.

SHERIFF'S SALE.—Deed.—Possession.—A sheriff's sale without a deed confers no title, nor does it entitle the purchaser to possession.

From the Washington Circuit Court.

H. Heffren and *J. A. Zaring*, for appellants.

S. B. Voyles, *H. Morris*, *D. M. Alsbaugh* and *J. C. Lawler*, for appellee.

BEST, C.—This action was brought by the appellee, as guardian of Joseph Lockenour, a person of unsound mind, against Martin C. Goss, Eliza Goss, John F. Jackson and Eliza J. Jackson, to recover possession of the southeast quarter of the southeast quarter of section 36, township 2 north, of range 5 east, in Washington county, Indiana.

The complaint consisted of two paragraphs. The first was in the usual form, and, in the second, an unlawful entry and a forcible detainer were averred. Issues were joined, submitted to the court, and a finding made against Martin C. Goss, Eliza Goss and John F. Jackson. A motion for a new trial was overruled, and judgment rendered against them. From this judgment they appeal, and assign as error the order of the court in overruling the motion for a new trial.

The reasons embraced in the motion were, that the finding was not sustained by sufficient evidence, was contrary to law, and that the court erred in refusing to allow appellants to read in evidence a certain power of attorney executed by the appellee's ward to one George W. Daily and Martin C. Goss, one of the appellants.

The title to the land was the question in dispute in this case. The appellee's ward owned the land, unless his title had been divested by a sheriff's sale. Before he was adjudged a person of unsound mind, a judgment upon an account had been recovered against him, which was a lien upon the land, and upon which it was claimed the land had been sold to Eliza Goss. The validity of this sale was disputed, and the appel-

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lee retained possession. The appellants Goss and Goss, with a view of obtaining possession under such purchase, put Jackson, their son-in-law, in possession of an unoccupied cabin upon said premises. This suit was brought to recover possession, and appellants, in support of their title, read in evidence the judgment, execution, return and sheriff's deed. The appraisement and sheriff's deed described land in section 26 instead of 36. No deed was read for the land in dispute. The appellants claim that the land was misdescribed, but no evidence, if admissible, was offered of such misdescription. The deed read did not prove title, and the sale without a deed did not convey title, nor did such sale entitle the purchaser to possession. No title was shown in Eliza Goss.

The evidence fully supported the material averments of the complaint. It was not necessary for the appellee to prove a forcible entry or detainer in order to recover.

From the recitals in the power of attorney which the court excluded, it appears that a judgment had been rendered against the appellee's ward, and that he authorized George W. Daily and Martin C. Goss to do any act necessary to stay and pay said judgment. He further authorized them to lease, mortgage, sell and convey any of his real estate, and to dispose of his personal property for the payment of his debts. It contained a stipulation that it was irrevocable without the written consent of Daily and Goss, and for that reason the appellants insist that it protected them in the possession so taken by them. We think otherwise. The possession was not taken by virtue of it, nor did it authorize Goss to take possession of Lockenour's property, nor to place others in possession of it. It was made to aid him in the enjoyment and preservation of his property, and not to enable them or either of them to deprive him of it in opposition to his wishes and in a manner prejudicial to his interests. The instrument was irrelevant, and for that reason properly excluded.

The appellants also insist that the court erred in excluding Martin C. Goss as a witness. This ruling was not mentioned

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in the motion for a new trial, and for that reason the question is not presented.

There is no error in the record, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things affirmed, at the appellants' costs.

No. 8498.

MITCHELL ET AL. v. LINCOLN, ADM'R.

JUDGMENT.—*Clerical Error or Mistake.—Evidence.*—Upon motion or petition, and notice, the court has power to correct clerical errors or mistakes in the entry or record of its judgments, and, to that end, parol evidence is admissible.

From the Warren Circuit Court.

J. McCabe, for appellants.

J. M. Rabb, for appellee.

HOWK, J.—This was a proceeding by notice and motion, instituted by the appellee against the appellants. In his verified motion or petition, the appellee represented in substance, that on the 6th day of June, 1879, he commenced a suit in the court below against the said appellants upon a note executed by them to him, as such administrator; that the said cause came on to be heard by and before said court, at its June term, 1879, the appellants having each been duly served with process therein ten days before the first day of said term; that on the 12th day of said term, to wit, on the 28th day of June, 1879, the appellants were each duly called, by order of the court, to answer the appellee's complaint therein, and, failing so to do, a judgment was duly and legally rendered by the court, in said cause, against the appellants

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upon their said default; that the said judgment was meant and intended to be for the full amount shown to be due upon said note, to wit, the sum of \$379.00; but that, by mistake and inadvertence, the said judgment was entered by the clerk of the court upon its records for the sum of \$279.00, all of which facts were more fully shown by the record and the files in said cause remaining on file in the office of the clerk of said court. Wherefore the appellee moved the court that the record of the judgment in said cause might be so corrected that the same should read and stand as a judgment against the appellants for the true amount due on said note, at said date, to wit, \$379.

To this motion or petition the appellants' demurrer, for the alleged insufficiency of the facts therein, was overruled by the court, and to this ruling they excepted. They then answered in two paragraphs, of which the first was a general denial, and the second paragraph was a special defence, to which the appellee replied by a general denial. The cause was tried by the court, and a finding was made that the judgment was originally entered for \$279.00, by mistake, as shown in said motion, and that it ought to have been entered for \$379.00; and the court then ordered and adjudged that the said mistake in the entry of said judgment should be corrected, in accordance with its finding. The appellants' motion for a new trial having been overruled by the court, and their exception saved to this ruling, they have appealed from the order and judgment on said motion to this court.

They have here assigned, as errors, the following decisions of the circuit court:

1. In overruling their demurrer to appellee's motion; and
2. In overruling their motion for a new trial.

In his brief of this cause the appellants' counsel says: "Both errors present the same question, namely, whether a record can be amended, so as to correct a mistake in the entry thereof, without any note or memorandum therein showing the mistake." The learned counsel adds, "that question is settled

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in appellants' favor in *Schoonover v. Reed*, 65 Ind. 313, and cases there cited." It seems to us, however, that the case at bar presents an entirely different question for decision, from the only one which can be said to have been settled in the case cited and relied upon by the appellants' counsel. In *Schoonover v. Reed*, *supra*, and in the cases there cited, the only question decided is, that *nunc pro tunc* entries of what had been previously done, but had not been entered at the time, could not be made upon parol evidence alone; and that they could only be made "where there is some memorial paper, or other minute of the transactions in the case," from which what had occurred could be ascertained. Doubtless, that is good law, and it meets our full approval. *Makepeace v. Lukens*, 27 Ind. 435.

But the question decided in these cases is not the question presented for decision in the case now before us. The appellee's motion was not that the court would make a *nunc pro tunc* entry of something that had been done but not entered in the original cause. The entry had been made therein at the proper time, but the appellee claimed that there was a mistake in this entry, and his motion was that the court would order the correction of such mistake. The case we are now considering is very similar in its facts to the case of *Jenkins v. Long*, 23 Ind. 460. In that case the court said: "It was not sought to supply any 'omission' in the proceedings, for on their face they were regular and complete, but simply to correct a clerical error of commission. The inherent power of the court was invoked—a power much older than the code—to make its record speak the truth as to what it had done, upon the suggestion that its ministerial officer, by mistake, had not correctly recorded its judgment actually rendered. *Burson v. Blair*, 12 Ind. 371. * * * * Was any evidence admissible, upon the hearing of the motion, outside of the judgment sought to be amended? This question can receive only an affirmative answer. It would be in vain to seek relief against a clerical error, unless such error may be shown

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to exist; and the instances would be rare indeed in which the error would be apparent upon the face of the record itself."

In *Sherman v. Nixon*, 37 Ind. 153, it was held by this court, that where a judgment by default had been entered for a sum too small, as appeared on the face of the papers in the case, through an error of the clerk or judge, the judgment might be corrected on motion, at a subsequent term, although the amount for which it had been erroneously entered had been paid. To the same effect, substantially, are the following cases: *Bales v. Brown*, 57 Ind. 282; *Latta v. Griffith*, 57 Ind. 329; *Miller v. Royce*, 60 Ind. 189; *Newhouse v. Martin*, 68 Ind. 224; *Reily v. Burton*, 71 Ind. 118; *Boyd v. Fitch*, 71 Ind. 306; *Hannah v. Dorrell*, 73 Ind. 465.

In this case the alleged mistake in the amount of the judgment was apparent on the face of the papers in the cause. Indeed, it is not claimed by the appellants' counsel that the mistake did not exist, precisely as stated in the verified motion; but he bases his claim to the reversal of the judgment, upon the sole ground that, unless there existed a written note or memorandum of the mistake in the case, the court could not correct it. That ground is hardly tenable, as it seems to us. The mistake might be shown to exist by parol evidence, without any written note or memorandum thereof. *Jenkins v. Long*, *supra*.

We find no error in the record of this cause.

The judgment is affirmed, at the appellants' costs.

No. 8745.

FIRESTONE v. FIRESTONE.

PRACTICE.—*Default*.—*Answer*.—*Trial*.—*Witness*.—Where a defendant's answer is standing, judgment can not be entered against him by default; but, unless summoned and failing to appear as a witness, he must be called and the cause submitted to the court for trial.

Firestone v. Firestone.

BILL OF EXCEPTIONS.—*Omission of Signature.*—*Power of Judge.*—*Correction of Record.*—A paper, purporting to be a bill of exceptions, presented to the judge August 22d, 1879, examined and approved and filed by him, but not signed, on that day, did not become a part of the record by his adding his signature April 26th, 1880, and appending an explanation of his omission thereof, the term having closed and time not having been given in term, and no proceedings being had by notice and motion for the correction or amendment of the record. ¹

From the Kosciusko Circuit Court.

E. Haymond and *L. W. Royse*, for appellant.

C. Clemans and *A. C. Clemans*, for appellee.

ELLIOTT, C. J.—The appellant had appeared and answered the complaint of the appellee, but on the day on which the cause was set for trial failed to appear, and judgment was entered against him by default. At the same term, and within a day or two after the judgment was entered, he moved to set aside the default and judgment.

It is the general rule, that where a defendant's answers to the complaint are standing, judgment can not be entered against him by default. In such a case, the proper course is to call the defendant and submit the cause to the court for trial. *Harris v. The Muskingum Manf. Co.*, 4 Blackf. 267 (29 Am. Dec. 372); *Maddox v. Pulliam*, 5 Blackf. 205; *Ellison v. Nickols*, 1 Ind. 477; *Kirby v. Holmes*, 6 Ind. 33; *Norris v. Dodge's Adm'r*, 23 Ind. 190; *Kellenberger v. Perrin*, 46 Ind. 282; *Love v. Hall*, 76 Ind. 326. We are speaking, we add to prevent misunderstanding, of cases where the defendant has not been summoned as a witness.

The record does not show any ruling upon the motion to set aside the default, nor does it show any exception. The only place where this appears is in what purports to be a bill of exceptions.

The paper which appellant treats as a bill of exceptions was presented to the judge of the court wherein this cause was tried, on the 22d day of August, 1879, but was not signed until the 26th day of April, 1880. The explanation for the

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failure of the judge to attach his signature to the bill appears in the statement appended to the paper, which is as follows:

"This bill of exceptions was presented to me August 22d, A. D. 1879, was by me examined and approved and filed with the clerk of the Kosciusko Circuit Court on that day in the belief that I had attached my signature thereto, but an examination of the bill discloses the fact that by mistake my signature was not attached, and by reason of such omission and mistake I now sign the same, this 26th day of April, 1880, for the said 22d day of August, 1879.

(Signed)

"ELISHA V. LONG,

"Judge Kosciusko Circuit Court."

The term at which the judgment was entered had closed, and no motion was made for the correction or amendment of the record, nor was any notice given the appellee that appellant would ask for the correction or amendment of the record. The paper designated as the bill of exceptions can not be so regarded, for it was not signed or authenticated as the law requires. The term at which the judgment was rendered having closed, the proceedings were no longer *in fieri*. The record could not, therefore, be amended in any essential particular without notice to the appellee. Records can only be amended by proceedings in court. What a judge does outside of the proceedings in court, or in proceedings properly therewith connected, is not a part of the record of the trial. Bills of exception must be signed in term or within the time after term designated while the court is in session. There is no power to sign a bill after term time, except in cases where the time has been extended by an order made during the term.

Whether the appellant, upon proper notice, could have secured an amendment such as that attempted, we need not and do not decide. It is certain that a judge can not, upon mere request, out of court, and by a mere certificate, make good a bill not signed within the time prescribed by law. It is the court that grants leave to amend records, and not the individual who holds the office of judge. It is the record of the

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court, and not the mere statement of the judge made out of court, that is evidence of the contents or authenticity of a record. If it were conceded that a judge might sign a bill after the term and after the expiration of the time limited, his bare statement that he did sign it, and of the reasons why he signed it, would not be matter of record. Judicial records are not made by such methods. Proceedings in court are essential to the existence of judicial records. Appellate courts look only to the record, not to the statements of the judge made out of court. The statement endorsed on the bill before us is no part of the record, for it was not made in court, neither in the due course of legal proceedings, nor in the rightful exercise of any judicial duty.

As there is nothing properly in the record showing the ruling upon appellant's motion, and nothing showing any exception, we are compelled to affirm the judgment.

Judgment affirmed.

No. 8469.

JONES ET UX. v. PARKS ET AL.

MORTGAGE.—*Contract of Assumption.*—*Right of Action.*—One who agrees with a mortgagor to assume and pay the mortgage debt may be sued upon his agreement either by the holder of the debt or by the mortgagor.

SAME.—*Pleading.*—*Practice.*—*Cross Complaint.*—*Personal Judgment.*—In an action of foreclosure and to obtain a personal judgment against a mortgagor and his grantee who had assumed the mortgage debt, the mortgagor filed a cross complaint alleging the promise of his grantee, and asking that the execution over be levied first upon his property. To the complaint the grantee answered, denying personal liability, because of an alleged rescission of his contract of assumption, before notice of acceptance by the plaintiff, and to the cross complaint filed a demurrer, which the court overruled, and, sustaining the plaintiff's demurrer to the answer, gave judgment as prayed.

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Held, that the cross complaint, to which, after the overruling of his demurrer, the defendant refused to plead, warranted the rendering of a personal judgment against him, and it was immaterial whether the ruling on the demurrer to his answer was right.

PRACTICE.—Pleading.—Cross Complaint.—Judgment.—Harmless Error.—

Where a complaint and a cross complaint are filed, praying substantially the same relief that was granted, the ruling upon an answer to the complaint is not material, if the judgment in the respect complained of was properly rendered upon the cross complaint.

SAME.—Contracts.—Exhibits.—Where copies of the contracts sued on are set out in the body of the complaint, an allegation that copies are filed is unnecessary.

From the Tipton Circuit Court.

J. W. Robinson and *D. Waugh*, for appellants.

J. W. Parks, J. D. McClaren, R. B. Beauchamp, G. H. Gifford, R. Vaile and *J. F. Vaile*, for appellees.

WOODS, J.—Complaint in two paragraphs by the appellee Sarah Parks, against the appellants and her co-appellees, Thomas F. Mozingo, Anna B. McElwee and others, to foreclose a mortgage and to obtain judgment for the amount of the mortgage debt. The note and mortgage sued on were executed to the plaintiff by Mozingo, who, it is alleged, afterward sold and conveyed the mortgaged land, together with other land, to the appellant Thomas B. Jones, who, as a part of the consideration for the conveyance, assumed and promised to pay the mortgage debt, which promise was afterward reduced to writing and signed and delivered by Jones to Mozingo, for the use of the plaintiff, who accepted the same. The paragraphs of the complaint do not differ in any respect necessary to be stated.

The appellants, having saved exceptions to the overruling of their demurrer for want of facts to each paragraph of the complaint, filed an answer, wherein they alleged that the agreement of said appellant to assume the mortgage debt was made with Mozingo alone, and that afterward, not being informed by the plaintiff, or by any one for her, that she had accepted the agreement, the said appellant and Mozingo, by

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mutual consent and for a valuable consideration in money paid by the appellant to Mozingo, cancelled the agreement.

The court sustained a demurrer for want of facts to this answer; the appellants excepted, and refused to plead further.

Mozingo filed a cross complaint, wherein he alleged the same facts substantially as are stated in the complaint, and prayed that a personal judgment be rendered against Jones upon his said contract of assumption, and that an order be made that the property of Jones be levied upon and exhausted before resorting to the property of him, the said Mozingo.

The appellants, having saved an exception to the overruling of their demurrer to this cross complaint, refused to plead thereto. Thereupon the court gave judgment upon the complaint and cross complaint, substantially as prayed in each, foreclosing the mortgage against all of the defendants, and rendering a judgment over against Jones and Mozingo, with direction for the levy of the execution first on the property of said appellant. This judgment the appellants afterward, at the same term of court, moved to modify, and saved an exception to the overruling of the motion.

The first objection made to the complaint is that it is not in terms declared that copies of the note sued on and of the alleged contract of assumption are filed with and made a part of the complaint. But the copies are contained in the body of the pleading, and such an averment, therefore, would have been superfluous. *Adams v. Dale*, 29 Ind. 273.

The other objections are substantially the same as were considered and decided, adversely to the appellants, in the case of *Davis v. Hardy*, 76 Ind. 272, and need not be restated here.

While it is true that the holder of a mortgage or other obligation may sue upon the promise of a third party made to the debtor, to assume and pay the debt, it is also the rule, that the debtor to whom the promise was made may sue to enforce it. *Devol v. McIntosh*, 23 Ind. 529; *Tinkler v. Swaynie*, 71 Ind. 562. It follows that the cross complaint of Mozingo was good, and entitled him to a judgment against the appel-

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lant upon his agreement to pay the debt, and to the order that the execution be first levied upon the appellant's property. This makes it immaterial to consider whether the answer of the appellants to the complaint was good or not. If it were conceded that the answer showed a good defence to the claim of the plaintiff for a personal judgment against the appellant, still the error of the court in sustaining the demurrer is harmless, because upon the cross complaint, which was not answered, it was the duty of the court to give a personal judgment against the appellant for the amount of the plaintiff's claim, and this judgment, though it had been entered formally in favor of the cross complainant, Mozingo, necessarily would have enured to the benefit of the plaintiff. Upon the whole record, therefore, the result reached was right, and the judgment can not be set aside on account of an error which did not affect the result.

What we have already said disposes of the motion for a modification of the judgment.

The judgment is affirmed, with costs.

 No. 8483.

EASTER v. SEVERIN ET AL.

SUPREME COURT.—Practice.—Co-parties on Appeal.—Waiver of Objection for Want of Parties.—Where one of several parties, plaintiff or defendant, appeals to the Supreme Court, he is only required, by section 551 of the code of 1852 (section 635, R. S. 1881), to give notice of his appeal to his co-parties, if any, in the judgment appealed from; and if the cause is submitted by agreement in the Supreme Court, without an objection then made of the want of proper parties, such objection is thereby waived.

MISTAKE OF FACT.—Reformation of Deed or Mortgage.—Where it appears that, by the mutual mistake of all the parties to a deed or mortgage as to matters of fact, the instrument does not conform to or express their intention and agreement, a court of equity will reform the instrument by correcting such mistake.

78	540
124	357
78	540
138	186
78	540
146	329
78	540
170	276

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MISTAKE OF LAW.—But where it is sought to reform an instrument on the ground of mistake, and it does not appear that the instrument does not contain the precise language the parties intended it should contain, the mistake, if any, is a mistake of law as to the legal effect of such language; and for mistakes of law, except under peculiar circumstances not shown to exist in this case, a court will afford no relief.

From the Clay Circuit Court.

J. A. McNutt, for appellant.

G. A. Knight and *C. H. Knight*, for appellees.

Howk, J.—This is the second time this cause has been before this court. The opinion and judgment of the court, when it was first here, are reported in *Easter v. Severin*, 64 Ind. 375.

The appellees sued the appellant, and Adam and Eliza Starr, as defendants, for the foreclosure of a certain mortgage and the recovery of the mortgage debt, in a complaint of two paragraphs. It was alleged in each paragraph of the complaint, that the mortgage in suit was executed by the defendants Adam and Eliza Starr, to secure the payment of the note of said Adam Starr, on certain real estate, particularly described, in Clay county; that said mortgage was duly recorded in the recorder's office of said county, on January 1st, 1874; and that afterwards the said Adam and Eliza Starr conveyed the mortgaged premises to the appellant. At the October term, 1874, of the court below, the appellees recovered a judgment by default against the said Adam and Eliza Starr, for the amount due and for the foreclosure of the mortgage and sale of the property. The appellant appeared, and at the June term, 1875, the cause as to him was put at issue, and the trial thereof resulted in a verdict for the appellees; upon which the court rendered judgment that they recover of the appellant their costs, and decreed that his equity of redemption in the mortgaged premises should be forever barred and foreclosed. From that judgment the said Easter alone appealed to this court, and as to him alone the judgment below was reversed, as will be seen from the opinion of the court on that appeal, in 64 Ind. 375. In that opinion

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will be found a full statement of the pleadings and proceedings in the case, to which we refer.

When the cause was remanded the appellees filed an amended complaint, to which the appellant's demurrer, for the alleged insufficiency of the facts therein to constitute a cause of action, was overruled by the court, and to this ruling he excepted. He then answered the amended complaint by a general denial thereof. The issues joined were tried by a jury, and a verdict was returned for the appellees; and over the appellant's motion for a new trial and his exceptions saved, judgment was rendered on the verdict, in accordance with the prayer of the amended complaint.

On this appeal, the appellant has assigned, as errors, the following decisions of the circuit court:

1. In overruling his demurrer to the amended complaint; and,
2. In overruling his motion for a new trial.

Before considering either of these alleged errors it is proper that we should dispose of a point made by the appellees' counsel, in their brief of this cause. Counsel say: "This record shows that Starr and wife are necessary parties to be joined in the appeal in this case, and not having been joined and notice served upon them, as provided by section 551 of the code, we insist that this court should dismiss this appeal." We do not think that this point is well taken. The judgment in the record in this case is a judgment against the appellant only, and he alone had the right to appeal therefrom. The fact that Starr and his wife had previously been his co-defendants in this action, neither authorized nor required the appellant to notify them of his appeal. They were not the appellant's co-parties in the judgment appealed from, within the meaning of section 551 of the code. *Hammon v. Sexton*, 69 Ind. 37. Besides, the record shows, that this cause was submitted to this court by agreement, without any objection thereto by the appellees for the want of proper parties. This was a waiver of the objection since urged, that Starr and

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his wife were necessary parties to this appeal. *The People's Savings Bank, etc., v. Finney*, 63 Ind. 460. The objection can not be sustained.

1. We pass now to the consideration of the question presented for decision by the first alleged error, namely, the sufficiency of the facts stated in the amended complaint to constitute a cause of action. In this complaint, after averring the execution of the note in suit by said Adam Starr, the appellees alleged in substance, that at the date of said note the said Starr was the owner of the following real estate in Clay county, Indiana, to wit: A strip or parcel of land commencing eighteen rods west of the north-east corner of the west half of the north-east quarter of section 20, in township 13 north, and range 6 west, and running thence south eighteen rods, thence east eight rods and six inches, thence north nine rods, thence west sixty-six feet, thence north nine rods, thence west sixty-six feet, to the place of beginning, and containing three-fourths of an acre, more or less; that prior to said date said Starr had divided said land into three town lots, adjoining or near to the town of Benwood, and the additions thereto, which were not at the time nor since numbered as town lots; that on October 30th, 1873, the said Adam and Eliza Starr, then being in Illinois, and intending to execute to the appellees a mortgage thereon, as security for the payment of said note of said Adam Starr, did execute in due form of law a mortgage to appellees, but, through the mutual mistake and inadvertence of all the parties thereto, erroneously described said real estate, as "Three town lots in the town of Benwood, aforesaid, being all the town lots owned by said Adam Starr in said town."

The appellees further averred, that all the parties to said mortgage intended, at the time of its execution, to describe the real estate first set out in the complaint; that said mortgage was duly recorded in the recorder's office of said county, on January 1st, 1874; that on December 8th, 1873, the said Adam Starr and his wife conveyed the said real estate to the appel-

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lant, who, at the time of receiving his deed therefor, well knew that the appellees' mortgage was intended by all the parties thereto to cover and include the said real estate; that the appellant took his said deed from said Starr and wife with full knowledge of the mistake and inaccurate description in said mortgage; that the appellant paid no present consideration for said real estate when said deed was made to him, but that he took said land on an indebtedness of said Adam Starr to him, and well knew that the appellees held a mortgage which was intended by all the parties thereto to include and embrace the said first described real estate, and no other. Wherefore the appellees asked that said mortgage be reformed, and the description of the real estate therein be corrected, as first set out and described in said complaint; and, when so corrected, that the said mortgage be foreclosed and the real estate be ordered to be sold to satisfy the sum found to be due on said note, and for all other proper relief.

Did this amended complaint state sufficient facts, in regard to the alleged mistake in the mortgage in suit, to entitle the appellees to a correction of such mistake and a reformation of the mortgage, as against the appellant? This question is fairly presented for decision by the alleged error of the court in overruling the appellant's demurrer to the complaint. When this case was first here, the court said: "It seems to us, that the appellees' mortgage can not be foreclosed as against the appellant, or against the land owned by him, until it has been so reformed by the judgment of the proper court, that it will cover the specific land which, the appellees allege, it was intended to cover thereby. If, by the mutual mistake of all the parties to such mortgage, as to any matter of fact, the lots or lands intended to be embraced in the mortgage were not embraced therein, the appellees might, perhaps, upon a proper showing of the facts in regard to such mistake, obtain a reformation of the mortgage, so that it would contain a correct description of such lots or lands. Upon proper

allegations of such mutual mistake, in their complaint in this action, the appellees might, perhaps, have obtained a judgment for the reformation of the mortgage, the correction of the description of the mortgaged property, and for the foreclosure of the mortgage as reformed, and the sale of the property by the corrected description thereof."

When the cause was remanded, the appellees acting, probably, upon the suggestions quoted from the former opinion of this court, filed the amended complaint, a summary of which we have given. It is earnestly insisted by the appellant's counsel that this amended complaint fails to show, by the facts alleged therein, such a mistake in the mortgage in suit as a court of equity will correct, and reform the instrument. Counsel says: "The appellees do not aver that they were ignorant of any fact; for aught that is shown by the pleading, all the parties to the mortgage knew the exact situation, location and condition of this strip or parcel of land, and its relation to the town of Benwood; knew at the time they drew the mortgage that the strip had not been platted, numbered or recorded, or anything done to constitute this strip, thus divided into three parcels, town lots. But did not their mistake arise out of the fact that they were ignorant of what it took in law to constitute a town lot? and did they not, purposely and intentionally, insert in the description in the mortgage the language, 'three town lots in the town of Benwood,' believing and understanding that that description would identify and pass the title to this strip of land; that by such description they could create a mortgage on this strip or parcel of land, near Benwood? The mistake they made was as to the legal effect of the description inserted. They nowhere aver that they intended to insert any other or different description; that they formulated any other description, and that the draftsman, by mistake, inserted any different description from that which they gave him. In a word, they do not aver that 'anything was omitted in the mortgage that was directed

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to be inserted, or that anything was inserted contrary to the direction of the parties.' ”

These are the points made by the appellant's counsel, in argument, and it seems to us they are well made. The mortgage in suit, for aught that is alleged in the amended complaint, contains the precise description of the real estate which the parties intended, at the time of its execution, it should contain. “The mistake, then, if any was made, was a mistake of law as to the legal effect” of the mortgage as executed. *Nelson v. Davis*, 40 Ind. 366. In *Allen v. Anderson*, 44 Ind. 395, the allegations in the pleading under consideration were similar to those in the complaint in this case, and the court there said: “The mistake must be one of fact, and not of law. It must be shown that words were inserted that were intended to have been left out, or that words were omitted which were intended to be inserted.” And further, “It appears to us that there was a greater mistake of law than of fact. It is not alleged that the parties were ignorant of what was in the deeds.” To the same effect, substantially, are the following cases in this court: *Baldwin v. Kerlin*, 46 Ind. 426; *The First National Bank, etc., v. Gough*, 61 Ind. 147; *Toops v. Snyder*, 70 Ind. 554.

In the case at bar, it is not pretended or claimed in the amended complaint, that all the parties to the mortgage in suit did not know, at the time of its execution, the exact language used therein. But they have since discovered that Adam Starr did not own any real estate embraced in or covered by the description used in the mortgage in suit. Therefore the appellees have asked, in their complaint, not to correct the description in the mortgage, but to strike it out, and, in lieu thereof, to insert in such mortgage a description which does not cover any lots or lands in the town of Benwood, but will embrace some real estate near that town. The mistake stated in the amended complaint can not be regarded, therefore, as a mistake as to any matter of fact, but only as to the legal effect of the language used in the mortgage. We do not understand it to be the province of a court of equity, or that

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it has the power, to relieve parties from the effects of such a mistake, in the manner and to the extent asked for by the appellees in their amended complaint.

We are of the opinion, therefore, that the court erred in overruling the appellant's demurrer to the amended complaint.

Our conclusion in regard to the insufficiency of the amended complaint, in this case, renders it wholly unnecessary, and perhaps improper, for us to consider now and pass upon any of the questions presented and discussed by counsel, under the alleged error of the court in overruling the motion for a new trial.

The judgment is reversed, at the appellees' costs, and the cause is remanded, with instructions to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

ELLIOTT, C. J., and WOODS, J., dissent.

No. 8203.

SHAW, ADM'R, v. FERGUSON ET AL.

LIEN.—Factor.—One who carries on the business of slaughtering hogs, and curing, storing and selling the product, as well for himself as for others, and makes advances to such customers, continuously holding possession of their product until he sells it, is a factor, and has a lien on the product of the customer, for services and advances.

SAME.—Measure of Damages.—Where a factor sells the property of his principal on which he has a lien for services and advances, he may retain the amount of his lien, out of the proceeds, whether the sale be authorized or tortious, and he is liable (no question being made about the price obtained) only for the balance.

PRACTICE.—Evidence.—Harmless Error.—The erroneous admission of evidence, and allowing an incompetent witness to testify, are not available error, if it appear affirmatively by the special findings of the court that the evidence thus improperly admitted had no effect whatever upon the result of the trial.

From the Marion Superior Court.

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D. V. Burns and *H. Burns*, for appellant.

B. Harrison, C. C. Hines, W. H. H. Miller, T. A. Hendricks, C. Baker, O. B. Hord and *A. W. Hendricks*, for appellees.

WORDEN, J.—Action by the appellant against the appellees to recover the value or proceeds of certain hog products sold by the defendants. The pleadings need not be stated, as no question arises upon them. Trial by the court and special finding of the facts and statement of conclusions of law, as follows:

“*First.* In the year 1871 the defendants were partners and the owners of a slaughtering and pork-packing establishment in the city of Indianapolis, and had for many years prior to that time been engaged in that business in that city. That said business embraced the slaughtering and dressing of hogs, and the curing, packing and selling of the products of hogs slaughtered. That said defendants slaughtered and packed hogs on their own account, and also for and on account of others, and had long established the custom and usage of advancing money to persons for whom they slaughtered and packed hogs, and of receiving from such persons compensation for slaughtering, packing and selling, and also interest on money advanced to persons for whom they, the defendants, slaughtered and packed hogs.

“*Second.* That the usage and custom which prevailed at the defendants' establishment was, to take the promissory notes of persons for whom they agreed to slaughter and pack hogs, for advances made on hogs to be furnished by such persons for the said defendants to slaughter and pack. That such notes as were taken by the defendants were made payable in bank. That the usage and custom of the defendants was to deduct the compensation for slaughtering, packing and selling from the proceeds realized from the sale of the products of the hogs slaughtered, and to apply the same to the payment of such notes or to pay the same to the person for whom the hogs were so slaughtered and packed.

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“ Third. That on the 10th day of October, 1871, the following contract was entered into between the parties: ‘I have this day agreed to pack 500 hogs with J. C. Ferguson & Co., at their pork house at Indianapolis, Indiana; J. C. Ferguson & Co. to charge the regular charges for packing; T. P. East to pay ten per cent. for all moneys so advanced on the hogs packed. (Signed) T. P. EAST.’

“ Fourth. That the aforesaid contract was the only express contract entered into between the said decedent and defendants, and that the aforesaid contract was subsequently modified by agreement of the contracting parties as to the number of hogs to be furnished by East for slaughtering and packing, and as to the amount of advances to be made by Ferguson & Co.

“ Fifth. That at said time there were various other establishments at Indianapolis and in other parts of the State of Indiana, carrying on the same business and at which the custom and business prevailed and was carried on of slaughtering hogs, curing and packing the products for the owners, and advancing money to aid in purchasing, feeding and shipping such hogs. That the usage and custom of these establishments throughout the State of Indiana was to make sales in their own names, account for the proceeds and deduct from the moneys received at such sales the charges for slaughtering the said hogs, curing and packing the products thereof, the commission for selling said products, and the moneys advanced to the owners, and paying over the balance of the moneys so received to the owners.

“ Sixth. That at the time of executing the aforesaid contract, and for many years prior thereto, there existed at the city of Indianapolis, and generally throughout the State of Indiana, in the business in which the defendants were engaged and among those engaged in the same line of business, the custom entitling the persons slaughtering and packing hogs to a lien on the products of hogs slaughtered for the charges of slaughtering, curing, packing and selling; and also to a lien for the sums

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of money advanced by the persons engaged in the business of slaughtering and packing hogs. That such custom entitled the persons advancing the money to a lien on the products of the hogs slaughtered ; but there is no evidence of any custom affecting the money advanced in cases where the person furnishing hogs has died after advances made and before the sale of the property.

"*Seventh.* That large sums of money were, by the defendants, advanced to the said decedent, T. P. East, and that the defendants required said East at one time to execute a note, payable at a future day at 'The Indiana National Bank,' in Indianapolis, for four thousand dollars (\$4,000), with Hughes East and one Lyons as sureties on said note, and that said East and Lyons were accommodation parties on said note, and were believed to be and were responsible parties pecuniarily at the time of executing the said note, and that said note was discounted in bank, the defendants endorsing the same, and the proceeds were paid to said Thomas P. East.

"*Eighth.* That, on the 14th day of May, 1872, said Thomas P. East departed this life intestate, at his residence in the county of Greene and State of Indiana ; that all of said hogs were slaughtered for and said money advanced to said Thomas P. East in his lifetime.

"*Ninth.* That, at the time of the death of said Thomas P. East, his estate was insolvent, and, on the — day of —, 1872, Hughes East was duly appointed administrator of said Thomas P. East's estate by the proper court of said county of Greene and qualified as such, and entered upon the duties of his said trust on the — day of —, 1872, and before the commencement of this action.

"*Tenth.* That on the — day of —, and before the commencement of this action, said estate of Thomas P. East, on proper petition to said court of Greene county, Indiana, was adjudged and declared to be insolvent.

"*Eleventh.* That, at the time of the death of said Thomas P. East, the said defendants had in their possession the products

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of said hogs, so delivered, of the value of nine thousand two hundred and seventy-three dollars and sixty-six cents (\$9,273.66), and that after his death they sold said products at private sale in the market for the said sum, and received said value in cash and in the usual course of business.

"*Twelfth.* That said property was never reported to the Probate Court of Greene county, Indiana, nor inventoried as a part of the estate of said Thomas P. East, nor was it sold by order of the said court, and that the same was never appraised; that the said sale was made by the said defendants with the knowledge and consent and direction of said Hughes East, the administrator of said estate, without any direction or approval of said probate court, and said sale was never reported to said court.

"*Thirteenth.* That all of the products of the hogs slaughtered for the said Thomas P. East were sold in the regular and usual course of business by said Ferguson & Co., as well those sold before as those sold after the death of said Thomas P. East.

"*Fourteenth.* That after the appointment of said Hughes East, as administrator, he resigned said trust, and the said plaintiff was duly appointed as the administrator *de bonis non* of said decedent's estate.

"*Fifteenth.* That neither the said Thomas P. East, in his lifetime, nor Hughes East, nor the plaintiff, ever made any objection to the defendants' claim of lien, or of their right to sell the products of the hogs slaughtered on account of said Thomas P. East, but said Hughes East, administrator as aforesaid, did consent thereto.

"*Sixteenth.* That, up to the date of the death of said Thomas P. East, the said defendants had sold of the products of the hogs slaughtered on his account, seven thousand one hundred and forty-four dollars and fifty cents (\$7,144.50) in value; that since the death of said Thomas P. East, they have sold products to the value of nine thousand two hundred and seventy-three dollars and sixty-six cents (\$9,273.66).

"*Seventeenth.* That the total value of the products which

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came into the hands of said defendants was the sum of sixteen thousand four hundred and eighteen dollars and sixteen cents (\$16,418.16).

"Eighteenth. That the total of all the charges and expenses due to the said defendants is two thousand seven hundred and one dollars (\$2,701), that being the total costs and expenses of slaughtering, curing, packing and selling.

"Nineteenth. That the total amount of principal and interest of advances made to Thomas P. East, by the said defendants, was thirteen thousand six hundred and ninety-two dollars and fifty cents (\$13,692.50); that the defendants allowed to the plaintiff, as interest on the money received by them on sales made, the sum of two hundred and sixty dollars and ninety-six cents (\$260.96), leaving due for advances and interest, the sum of thirteen thousand four hundred and thirty-one dollars and fifty-four cents (\$13,431.54).

"Twentieth. That the amount realized from the sales exceeded the costs and charges, money advanced and interest thereon, in the sum of two hundred and sixty-five dollars and sixty-two cents (\$265.62); that the interest thereon until the 25th day of February, 1879, amounts to the sum of one hundred and four dollars and sixty-nine cents (\$104.69).

"Twenty-first. That the aforesaid property remained continuously in the possession of the defendants from the time they received it until the sales were made, and that during all this time it was stored and cared for by them.

"Twenty-second. That while Hughes East was acting as the administrator of Thomas P. East's estate, and before his resignation of said trust, he did receive from the said defendants, a statement as to the condition of the accounts between his intestate and the defendants, from which it appeared that there was then due and owing from the defendants to Thomas P. East's estate the sum of two hundred and eighty-five dollars and sixty-two cents (\$285.62); that the said Hughes East, as administrator as aforesaid, did then and there direct that the said defendants should place said last mentioned sum to the

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credit of him, the said Hughes East, on his own individual account, and that the said defendants did give him credit therefor, on his individual account.

"Twenty-third. That the balance shown as aforesaid to be in favor of said Thomas P. East's estate has never been paid, except as above shown, by entering it to the credit of said Hughes East.

"Twenty-fourth. That at the time of said settlement and accounting with said Hughes East, administrator as aforesaid, the said estate of said Thomas P. East was understood and believed to be solvent; that it was subsequently ascertained that the said estate was insolvent.

"CONCLUSIONS OF LAW.

"Upon the foregoing facts, I state the conclusions of law as follows:

"First. That by the custom and usage prevailing at the defendants' establishment, and which had for many years prevailed throughout the State of Indiana, the defendants were entitled to hold a lien upon the products of the hogs by them slaughtered for the plaintiff's intestate, for all charges of slaughtering, curing, packing, storing, and for all advances of money made, together with interest thereon, and that this lien continued after, and was not affected by, the death of the said Thomas P. East.

"Second. That the plaintiff herein is not entitled to recover, except as to the sum of two hundred and sixty-five dollars and sixty-two cents (\$265.62) and interest, because the defendants had a right to hold said property as security for their charges and advances, and had the further right to maintain possession thereof and sell it, as they did, in the usual and regular course of business.

"Third. That the credit of the balance found due from the defendants to the plaintiff's intestate, on the individual account of said Hughes East, was not a payment of said balance; that the plaintiff is entitled to recover the said balance,

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principal and interest, amounting to the sum of three hundred and seventy dollars and thirty-one cents (\$370.31).

"BYRON K. ELLIOTT, Judge."

The plaintiff excepted to the conclusions of law, and also moved for a new trial, but his motion was overruled. Judgment accordingly for the plaintiff for the sum of \$370.31. Judgment affirmed on appeal to general term. The plaintiff, claiming to be entitled to a larger amount, appeals to this court.

We are of opinion that the conclusion stated by the court, that the plaintiff was entitled to recover only the amount mentioned, was correct. This is the vital point in the conclusion.

In reference to the conclusion, as to the effect of the custom found, we express no opinion, inasmuch as, from the views we take of the case, the custom was unnecessary to the conclusion as to the amount which the plaintiff was entitled to recover.

The special findings show that the relation of principal and factor existed between the defendants and Thomas P. East, in his lifetime, in reference to the sale of the hog products.

The business of the defendants was the slaughtering, dressing, etc., of hogs, and the sale of the products, not alone on their own account, but also on account of others. See Wharton on Agency, section 735. The defendants made to East advances on the hogs which were by the latter delivered to them to be slaughtered and sold, and the defendants had continuous possession of the property, stored and cared for it, until they finally sold it in the usual course of business. Taking the findings altogether, we are satisfied that the defendants were the factors of the deceased for the sale of the products of the hogs. This is not stated in terms in the findings, but it is the legal effect of them.

The law gave the defendants, as slaughterers, packers, etc., a lien on the products for their reasonable charges for slaughtering, packing, etc. *Hanna v. Phelps*, 7 Ind. 21.

The law also gave the defendants, as the factors of the deceased, a lien on the property for advances thereon, expenses and commissions. Wharton on Agency, section 767.

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This lien was not divested by the death of Thomas P. East.

It is said that where goods are merely in transit to the factor at the time of the death of his principal, the death of the latter does not prevent the lien of the factor from attaching, if he has made advances or incurred expenses on the faith of the consignment: Wharton on Agency, section 773.

It appears from the finding, that the value of the hog product that came into the hands of the defendants, and which was sold by the defendants, some before and some after the death of the deceased, amounted, after adjusting the interest, to \$260.96 more than the amount of their costs and expenses for slaughtering, etc., and their advances to the deceased; and this sum, with interest thereon, was the amount recovered.

This sum was all the plaintiff was entitled to, unless he was entitled to recover the full value of the property sold after the death of the deceased, thus depriving the defendants of all benefit of their lien on the property. It seems to us to be clear in principle as well as by authority, that the plaintiff was not entitled to the full value of the property sold by the defendants after the death of the deceased.

It would seem that if the administrator of the deceased had sold the property for its full value, and not subject to the lien of the defendants, he could have been required to pay, out of the proceeds, the amount of the defendants' lien, instead of making the whole fund arising from the sale general assets.

It is certain, at least, that the administrator could not, without the consent of the defendants, have sold the property otherwise than as subject to the lien of the latter. Whitaker's Law of Lien, 75; *Godin v. London Assurance Co.*, 1 Burr. 489.

We do not decide whether the defendants had the legal right to make the sale after the death of the deceased, in order to reimburse themselves for their advances, etc.; but assuming that they had not, and that the sale thus made was tortious, still the measure of the plaintiffs' damages, in an action for the tort, was the value of the property less the amount of the

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lien which the defendants had upon it. This, as has been seen, was the amount which the plaintiff recovered.

This rule as to the measure of damages furnished the plaintiff a full indemnity for all the loss sustained in consequence of the sale of the property by the defendants after the death of the intestate, and is abundantly sustained by the following, among other authorities: *Fowler v. Gilman*, 13 Met. 267; *Briggs v. Boston, etc., R. R. Co.*, 6 Allen, 246; *Work v. Bennett*, 70 Pa. St. 484; *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 269, 307; *Belden v. Perkins*, 78 Ill. 449; *Chinery v. Viall*, 5 H. & N. 287; *Brierly v. Kendall*, 17 Q. B. 937; *Johnson v. Stear*, 15 C. B. (N. S.) 330, and note; *First Nat. Bank of Louisville v. Boyce*, 78 Ky. 42; *Stearns v. Marsh*, 4 Denio, 227; *Baker v. Drake*, 53 N. Y. 211. In the case last above cited, the court said that "the rule of damages should not depend upon the form of the action. In civil actions the law awards to the party injured a just indemnity for the wrong which has been done him, and no more, whether the action be in contract or tort; except in those special cases where punitive damages are allowed, the inquiry must always be, what is an adequate indemnity to the party injured, and the answer to that inquiry can not be affected by the form of the action in which he seeks his remedy."

What we have said disposes of the questions arising on the special finding of facts, and the conclusions of law thereon.

We proceed to the motion for a new trial.

It is urged that the finding is not sustained by the evidence, in this, that the amount found due the plaintiff was too small. We are of opinion, however, that the evidence justified the finding.

It is also urged that the court erred in admitting certain testimony in relation to the custom mentioned in the finding. Without stopping to inquire whether there was any well founded objection to the testimony, we think it clear that its introduction did the plaintiff no possible harm, inasmuch as, in the view we take of the case, the custom is an entirely un-

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essential and unimportant element in the case. The conclusion reached by us would have been the same had the custom not been found.

It is objected that Hughes East, the former administrator, was permitted to answer the following question: "After you were appointed you ratified what was done? Did you not, after you were appointed, have an accounting with them (the defendants) and receive from them the proceeds and the balance of the proceeds, taking into account all the sales they had made up to the 25th of July?"

The objection urged to this question is, that "the administrator was the agent of the law, with limited authority. He could neither authorize an unlawful sale to be made, nor ratify one after it had been made. The appellees were bound to take notice of the law, and they can not justify their unlawful acts by proving that a person having no such power either authorized or ratified them." The objection thus made shows that the evidence was harmless as respects the ground pointed out, as we have considered the case on the assumption that the sale made after the death of the deceased was tortious and unlawful.

Among the reasons for a new trial are the following:

"The court erred in permitting J. C. Ferguson" (one of the defendants) "to testify that after the death of Thomas P. East he received directions from said Hughes East as to what should be done with the product of the hogs."

"The court also erred in permitting the said Ferguson defendant, to testify as to the declarations of Hughes East while he was administrator of Thomas P. East's estate, made to him. * * *

"Also erred in permitting this question to be asked said Ferguson, and his answer over the plaintiff's objection, viz.: Were or were not all contracts for advancement of money in hogs, under such circumstances, made with reference to that custom?"

"Also erred in permitting said defendant Ferguson to testify that Hughes East notified him he was administrator of

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the estate of the decedent, and stated to them to use their best judgment, and close the stuff out to the best advantage, and make all out of it they could."

It appears by a bill of exceptions, that objection was made on the trial that Ferguson, being a party, was incompetent to testify to the matters proposed to be proved by him, but the objection was overruled and exception taken. It is now objected here, that Ferguson was incompetent to testify in the cause at all. See act of March 11th, 1867, 2 R. S. 1876, p. 132, amended in 1879, Acts 1879, p. 245.

It is quite doubtful whether the above reasons for a new trial were sufficient to bring in review the question whether the witness was competent to testify in the cause. The reasons filed would seem to call attention to the character of the testimony rather than the competency of the witness to testify.

But, however this may be, conceding that the question is properly saved, the evidence mentioned in the above reasons for a new trial was entirely harmless and worked no injury whatever to the plaintiff, in view of the ground already indicated in this opinion, on which the case must be decided.

If the court erred in permitting the witness to testify to the matters thus mentioned, because of the incompetency of the witness or otherwise, the error was a harmless one. We find no available error in the record.

The judgment below is affirmed, with costs.

ELLIOTT, C. J., took no part in the decision of this case.

Petition for a rehearing overruled.

No. 8500.**MEYER v. MORRIS.**

PRACTICE.—*Suits by or against Administrators.—Parties, when Witnesses.*—Under the second proviso in section 1 of the act of March 15th, 1879, amendatory of section 2 of the act of March 11th, 1867, defining who

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should be competent witnesses (Acts 1879, p. 245), in an action against the representative of a deceased maker and a surviving maker of a promissory note, where each sets up a separate defence, it is discretionary with the trial court to permit the surviving maker to testify.

From the Orange Circuit Court.

M. B. Williams, for appellant.

A. Noblitt, *A. J. Simpson* and *W. Farrell*, for appellee.

Howk, J.—This was a suit by the appellee, as plaintiff, against the appellant and one Martin Meyer, as the administrator of the estate of John Meyer, deceased, as defendants. Appellee's complaint counted upon a promissory note for \$500, dated June 11th, 1870, executed by the appellant and said John Meyer, in his lifetime, payable thirty-six months after date, to the order of Samuel Affolter, and by him endorsed to the appellee. The complaint alleged that the note was due and remained unpaid. The defendants severed in their defence, and filed separate answers. The appellant pleaded specially, that he executed the note in suit on Sunday, and on no other day or time, and had not since ratified the same in any way. The defendant Martin Meyer pleaded the former recovery of the amount due on the note. The appellee replied to both of said answers, in denial of the matters alleged therein.

The issues joined were tried by the court and a finding was made for the appellee as against the appellant, for the amount due on the note, and for the defendant Martin Meyer, as against the appellee. Over the appellant's motion for a new trial, and his exception saved, the court rendered judgment on its finding in favor of the appellee, and against the appellant, for the amount due on the note, and in favor of the defendant Martin Meyer, and against the appellee, for his costs.

The decision of the circuit court in overruling his motion for a new trial is the only error assigned by the appellant in this court. In this motion the only cause assigned for such new trial was an alleged error of law occurring at the trial, and excepted to, in this, in sustaining appellee's objections to the evidence offered to be given by the appellant as a wit-

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ness in his own behalf, and in excluding such evidence. The bill of exceptions shows, that when the appellant, on the issue joined between him and the appellee, offered himself as a witness to testify in his own behalf only, that the note in suit was executed by him on Sunday, and that he had not, at any time since, ratified said note, the appellee objected to the offered evidence on the ground of the appellant's incompetency as a witness in this case. This objection was sustained by the court, and the offered evidence of the appellant was excluded.

Did the court err in this ruling? This is the only question presented for our decision by the record of this cause. The record shows that this case was tried and determined by the court below, at its October term, 1879. At that time the law in force in this State on the subject of the competency of witnesses, as applicable to this case, was the second proviso in section 1 of the act of March 15th, 1879, amendatory of section 2 of the act of March 11th, 1867, "defining who shall be competent witnesses," etc. This second proviso reads as follows: "*Provided, also, That in all suits where an executor, administrator or guardian is a party, in a case where a judgment may be rendered either for or against the estate represented by such executor, administrator or guardian, neither party shall be allowed to testify as a witness, unless required by the opposite party or the court trying the cause, except,*" etc. Acts 1879, p. 245. We need not set out the exceptions to the proviso quoted, as it is clear that none of them are applicable to the case now before us. It can not be doubted that the competency of witnesses is a proper subject of legislation; and where, as in the proviso quoted, the General Assembly of this State have declared in plain, positive and unequivocal terms, that in all such suits as the one now before us, "neither party shall be allowed to testify as a witness," it is the duty of the courts to enforce the law as it is written. In this case, an administrator was a party in the trial court, and, upon the issues joined, the court could not do otherwise than to render a judgment either for or against the

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estate represented by such administrator, and it is not claimed that the appellant was required to testify as a witness, "by the opposite party or by the court trying the cause."

It will be seen that this case comes squarely within the exact letter of the statute, and we can not say that the court erred in sustaining the objections to the competency of the appellant as a witness, or in excluding his offered evidence. The statute clothed the trial court with the right and power to require the appellant to testify as a witness in the case, and, if it had appeared to that court that such requirement would subserve the right and justice of the case, we do not doubt that the court would have required the appellant to testify. However this may have been, it is certain, we think, that the statute gave the court trying the cause a discretionary power in regard to the admission or exclusion of the appellant's offered evidence; and we can not say, from anything apparent in the record, that the court erred in the exercise of such discretionary power. *Jenks v. Opp*, 43 Ind. 108; *Hoadley v. Hadley*, 48 Ind. 452; *Charles v. Malott*, 65 Ind. 184; *Carter v. Zemblin*, 68 Ind. 436.

For the reasons given, we are of the opinion that the court committed no error in overruling the appellant's motion for a new trial.

The judgment is affirmed, at the appellant's costs.

No. 7947.

SHOEMAKER v. AXTELL.

INJUNCTION.—Referee.—Appeal.—Injunction is not the proper remedy to prevent a referee appointed to take evidence from proceeding to the discharge of his duties as such. An appeal is necessary.

SAME.—Legal Remedy.—Equitable Relief.—Where a party's legal remedy is perfect and complete, equitable relief will not be granted. The principle remains as it was when actions at law and suits in equity were distinct.

Shoemaker v. Artell.

From the Monroe Circuit Court.

J. W. Buskirk, H. C. Duncan and W. C. L. Taylor, for appellant.

J. H. Loudon and R. W. Miers, for appellee.

WORDEN, J.—Complaint by the appellant against the appellee for an injunction. Demurrer to the complaint for want of sufficient facts sustained, and exception. Judgment for defendant.

The complaint alleged, in substance, that in an action in the Monroe Circuit Court, by the appellant against one Milton J. Smith, to dissolve a partnership between the parties to that action, and to settle up the business thereof, the appellee, Artell, was, by the court, appointed a referee "to take the evidence herein (therein) touching the dealings of said partners with said firm, and their respective rights in and to the firm assets; and also to audit and report a list of the indebtedness of said firm, and to make a report of the facts and of his finding herein to this court," etc.

The complaint sought to enjoin the appellee from proceeding to the discharge of his duties as such referee, on the ground, substantially, that the court had no right to appoint a referee, the parties being entitled to a trial by jury, unless they consent to a trial otherwise.

If there was any error in the appointment of the referee, or in referring any matters to him, this furnishes no ground for an injunction to restrain him from proceeding to act, for the reason that the appellant had a plain and ample remedy in that action.

If in that action the court committed any error in reference to the appointment of the referee, an exception, and an appeal to this court, would have furnished a remedy for the error.

"If the defendant at law has a good defence at law, and the remedy at law is as perfect and complete as the remedy in equity, the court will not restrain the action." Kerr Injunctions, 15, and notes.

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The code has abolished the distinction between actions at law and suits in equity, but the principle thus announced is quite analogous to that involved here.

The judgment below is affirmed, with costs.

Petition for a rehearing overruled.

No. 8437.

LAWSON ET AL. v. DEBOLT.

VOLUNTARY ASSIGNMENTS.—Sale of Debtor's Real Estate, a Judicial Sale.—

Vested Right of Debtor's Wife to Possession and Partition.—The sale of a debtor's real estate, under the act of March 5th, 1859, providing for voluntary assignments, 1 R. S. 1876, p. 142, is a judicial sale within the meaning of the act of March 11th, 1875, 1 R. S. 1876, p. 554, vesting the inchoate interests of married women in the lands of their husbands, when their title has been divested, and entitles the wife to immediate possession and partition.

SAME.—Jurisdiction.—*Sale of Real Estate in Another County.*—The circuit court of the county in which the debtor resides, and makes his assignment of his property, has jurisdiction to order and confirm the sale and conveyance of his real estate in another county.

SAME.—Acts of February 1st and 26th, 1875.—Amendment.—The act of February 26th, 1875, 1 R. S. 1876, p. 145, undertaking to amend section 10 of the act of March 5th, 1859, after its effectual amendment by the act of February 1st, 1875, 1 R. S. 1876, p. 144, is unconstitutional and void.

SAME.—Private Sale on Credit.—Deferred Payments.—Section 10, 1 R. S. 1876, p. 144, as amended, fully authorizes an order by the court for the sale of the debtor's real estate at private sale, on a credit not exceeding two years from the date of such sale.

SAME.—Collateral Attack.—The orders of a circuit court having jurisdiction of an insolvent debtor's assignment, even though erroneous, are not open to collateral attack.

From the Madison Circuit Court.

J. W. Sansberry and M. A. Chipman, for appellants.

H. D. Thompson, for appellee.

ELLIOTT, C. J.—Malinda DeBolt, the plaintiff below and

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here the appellee, was the wife of William DeBolt on and long prior to the 25th day of December, 1876. On that day her husband made a voluntary assignment for the benefit of creditors, but she did not join in the deed of assignment. At the time the assignment was made, the appellee's husband was the owner of certain real estate situated in the county of Madison, but was then a resident of Randolph county. The assignee applied for an order to sell the real estate in Madison county, and received from the Randolph Circuit Court an order directing him to make the sale prayed for. Sale was made by the assignee pursuant to the order of the court, and the appellant Alfred Lawson purchased the land and a deed was duly executed to him by the assignee. The sale was reported to the court by the assignee, and was duly confirmed. The appellee demanded partition; appellant refused to comply with her demand and asserted title to the entire land.

The sale made by the assignee and confirmed by the court was a judicial sale. The matter of the trust created by the assignment was within the jurisdiction and control of the court; the petition to sell brought the specific matter up for judicial action; the order of sale was the result of this action, and the judgment confirming the sale adopted as that of the court the sale and conveyance of the assignee. In *Williamson v. Berry*, 8 How. 495, 547, the Supreme Court of the United States held that a judicial sale is "one made under the process of a court having competent authority to order it, by an officer legally appointed and commissioned to sell." Some of the cases do hold that a sale can be considered a judicial one only where made *pendente lite*, and that a sale by a sheriff is therefore not a judicial sale, and this may perhaps be considered the general technical rule. We do not believe that the Legislature in enacting that a wife might assert her right to her interest in the lands of her husband, intended that the words "judicial sale," as used in the act of 1875, should have a meaning so narrow and technical. If such a meaning were assigned to the words the purpose of the statute would be defeated. The statute, if

so interpreted, would be of very little practical effect. There would not be one case in a thousand where it would apply. The intention of the Legislature plainly was to give the wife an immediate, present right in all cases where the title of the husband is divested by sales made pursuant to judicial orders, decrees or judgments. The mere words of a statute must always give way to the intention of the Legislature, when that is manifest and certain. It is very evident that the Legislature never meant that the wife's rights should be made to depend upon fine-spun distinctions, or close technical definitions.

The decisions heretofore made clearly annex a much broader signification to the words "judicial sale" than that which, in an exact technical sense, they possess. *Roberts v. Shroyer*, 68 Ind. 64; *Ketchum v. Schicketanz*, 73 Ind. 137; *McCracken v. Kuhn*, 73 Ind. 149. In *Jackman v. Nowling*, 69 Ind. 188, it was expressly adjudged that a sheriff's sale is a judicial sale within the meaning of our statute. The point was so ruled in *Taylor v. Stockwell*, 66 Ind. 505. But if we were driven to assign to the words "judicial sale" the most rigid and narrow technical meaning, there would be no difficulty in this particular case, for the assignee acted under the order of a court, "the matter was depending," there was a report and an order of confirmation. To such a strait, however, neither the rules of law nor the demands of public policy force us; on the contrary, they unite in requiring of us a broad and liberal construction of the language used by the Legislature.

It is contended that the Randolph Circuit Court had no authority to make the order of sale. On this point we have no difficulty. The trust created by the assignment was within the jurisdiction of that court. The trustee and the trust property were subject to its control and bound by its judgments. The whole trust, with all its appendages, was within the jurisdiction of the court of the county where the assignor resided and the assignment was executed. Its orders reached and operated upon the trustee, and it alone possessed the authority to make orders, giving or withholding power to sell. The trus-

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tee was not bound to apply to any other court. He had no right to make reports or receive instructions from any other tribunal.

The order of sale is declared by counsel to be a nullity because the court has no power to order lands sold at private sale. If it were granted that the court misconceived its power, the order would not be void, for such a misconception would be a mere error. Even if it were such an error as might be made available upon a direct attack, it would not avail one where assault is made by indirection. Error in the course of legal proceedings is one thing, and lack of jurisdiction quite another and different thing. It can not be doubted that the court had complete jurisdiction. If it had jurisdiction, its orders, even though erroneous, were not mere nullities.

There is some confusion in the statutes. Two acts amending section 10 of the voluntary assignment act were passed at the session of 1875, one on the 1st day of February and the other on the 26th day of the same month. The first act is the effective one, for the last is an attempt to amend a section which had already been superseded by amendment. The act of February 1st, 1875, contained an emergency clause, and was in force when the second act was adopted. Under the settled rule, the act of February 26th, 1875, is of no validity. *Brokaw v. The Board, etc.*, 73 Ind. 543; *Blakemore v. Dolan*, 50 Ind. 194; *Reissner v. Hurle*, 50 Ind. 424; *Board, etc., v. Markle*, 46 Ind. 96; *Draper v. Falley*, 33 Ind. 465.

The act of February 1st, 1875, authorizes the assignee to sell at public sale and to sell on credit, but provides that the time of payment shall not exceed twelve months, and this was the provision of the original act. The amendatory act contains this provision: "*And provided further, That the judge of said court may, for good cause shown, order the sale of any real estate so assigned, to be sold on credit, and shall divide the payments into instalments, to fall due at such time as the court may order.*" 1 R. S. 1876, p. 145. This statutory provision furnishes an irrefutable answer to appellants'

argument, for it fully empowers the court to order either a public or a private sale upon such terms as to payment as may be deemed expedient and proper. Without the order of the court the credit can not exceed twelve months, but the court may, upon cause shown, give longer time.

It may well be doubted whether the appellant is in a situation to aver that the proceedings upon which his own title depends are void. He is certainly endeavoring to lop off the branch upon which he is himself sitting, and success would give him as hard a fall as anybody else. But we are not required to decide anything upon this point, and we pass it.

There can be no doubt that where, as in the present case, the sale is made by order of the court, and is duly reported and confirmed, it is a judicial sale within the meaning of our statute. We think all sales of real estate made by assignees acting under the provisions of the statute concerning voluntary assignments, must be regarded as judicial sales. The assignment of the debtor creates a trust. This trust at once comes within the jurisdiction and control of the court. The assignee administers it under the direction of the court. All that is done by the assignee is done under the sanction of judicial authority. Reports must be made to the court. The trustee must account to, and obey the order of, the court possessing jurisdiction of the trust. 1 R. S. 1876, p. 145. The power of the court begins with the creation of the trust and continues until, by order or decree, the trust is finally closed. From first to last the judicial authority extends over the trustee and the trust property. A sale made by a trustee acting under the supervision and subject to the control of the judiciary has many of the essential features of a judicial sale, enough, certainly, to bring it within the spirit of our statute.

The act of 1875 intends, that in all cases where the property of the husband goes to satisfy the demands of his creditors, and goes by virtue of any legal process, order, writ, judgment or decree of court, or through any judicial intervention, the wife shall have an immediate right, and not be postponed

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until the death of her husband. The character of the means which takes the property from the husband, and applies it in satisfaction of the demands of the creditors, is not the material or controlling consideration. The important thing is the end reached, not the means by which it is attained. The Legislature did not intend that the wife's rights should depend upon the procedure by which the property was taken from her husband and appropriated to the payment of his indebtedness. It makes no difference so far as the wife's rights are concerned, whether the property is seized upon execution, assigned in bankruptcy or conveyed to a trustee under insolvents' acts; for whatever be the method which takes it from the husband, the reason for giving the wife her interest is the same. The Legislature, we are confident, never intended that the means adopted to give the creditors the property should control and determine the wife's rights. It matters little or nothing to the wife how the property is taken from the husband, whether by sale under an assignment, or whether by sale under execution, in either case the important matter with her is the enjoyment of the property while its enjoyment will be of material benefit. It was to effect this object that the act of 1875 was enacted, and the legislative intent ought not to be defeated by making the question turn upon the means used to get the property from the husband and appropriate it to the benefit of his creditors.

Another consideration is entitled to weight. If we hold that the wife can not secure the benefit of the act of 1875 in cases where her husband makes a voluntary assignment, then the usefulness of the act concerning such assignments will be greatly impaired, for men will suffer their property to be sold upon execution, and thus save the rights of their wives, rather than assign it and thus destroy such rights.

Judgment affirmed.

Erb v. Moak.

No. 8679.

ERB v. MOAK.

BILL OF EXCEPTIONS.—*Time of Filing.*—*Practice.*—*Supreme Court.*—Where the time given for the filing of a bill of exceptions was *until* the 2d day of the succeeding term of the court, the filing of such bill on that day was not within the time granted, and such bill did not constitute a part of the record on appeal to the Supreme Court.

From the La Grange Circuit Court.

G. A. Cutting and *O. S. Ballou*, for appellant.

J. D. Ferrall, for appellee.

FRANKLIN, C.—The complaint in this case was in three paragraphs, 1st, for work and labor; 2d and 3d, on special contracts for the building of a dwelling-house.

Answer in five paragraphs, and reply in denial. Trial by jury and finding for the plaintiff, with answers to interrogatories returned by the jury. Motions for a new trial and in arrest of judgment were overruled, and exceptions reserved.

The errors assigned in this court are the overruling of the motion for a new trial, and the motion in arrest of judgment.

No objection has been made in this court to the overruling of the motion in arrest of judgment, nor do we perceive any.

Under the overruling of the motion for a new trial, there is no question which appellant attempts to present that does not depend upon the bill of exceptions; and appellee's counsel insists that the bill of exceptions is not properly in the record.

The trial was had at the November term, 1879, and time was given by the court to appellant *until* the 2d day of the next term to file his bill of exceptions. On the 2d day of the next term, the judge signed the bill of exceptions, and it was on that day duly filed with the clerk.

On the second day is not included in *until* the 2d day. The bill of exceptions was filed one day too late, and can not be considered as a part of the record. In order to be properly in the record, the bill of exceptions must be filed within the

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time fixed by the court. *Newby v. Rogers*, 40 Ind. 9, p. 16; *DeHaven v. DeHaven*, 46 Ind. 296; *Board of Commissioners v. Eperson*, 50 Ind. 275; *Toledo, etc., R. W. Co. v. Howes*, 68 Ind. 458; *Buskirk's Practice*, 144, and cases there cited.

As there is no question properly presented in this case for decision, the judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and the same is, in all things affirmed, at appellant's costs.

WOODS, J., not participating.

No. 9690.

LEECH v. THE STATE, EX REL. WYSOR.

CITY.—*School Trustee.—Resignation.—Vacancy.—Election.*—When a city school trustee resigns his office, to take effect at a future day, the city council may elect to fill the vacancy before the day fixed for the taking effect of the resignation.

INJUNCTION.—*Supreme Court.—Jurisdiction.*—The Supreme Court, by virtue of section 1147, R. S. 1881, has jurisdiction to issue an injunction forbidding the enforcement of a judgment below, pending an appeal therefrom, when necessary to maintain the *statu quo*.

From the Delaware Circuit Court.

O. J. Lotz, R. S. Gregory, J. F. Duckwall, T. J. Blount, C. B. Templer, A. C. Mellett, W. B. Dunn, S. Spooner, L. T. Wilson, W. H. M. Cooper, W. H. Coombs, J. Morris, R. C. Bell, T. A. Hendricks, C. Baker, O. B. Hord and A. W. Hendricks, for appellant.

C. E. Shipley, W. Brotherton, J. W. Ryan, G. H. Koons and J. S. Frazer, for appellee.

WORDEN, J.—This was an information in the nature of a *quo warranto* by the appellee against the appellant, the object

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of which was to establish the relator's supposed right to the office of school trustee for the city of Muncie, the functions of which were being exercised by the appellant Leech, without right, as was claimed.

There were three paragraphs in the information, but the first and second were withdrawn, so that no question arises upon them. The defendant demurred to the third paragraph for want of sufficient facts, but the demurrer was overruled. Answer, issue, trial by jury, verdict and judgment for the plaintiff.

The first error assigned is that "the court below erred in overruling appellant's demurrer to the third paragraph of complaint." This assignment we proceed to consider.

The essential facts alleged in this paragraph, on which the question involved must be decided, are as follows:

That on June 2d, 1879, the common council of the city of Muncie elected John L. McClintock as one of the school trustees for the school city of Muncie for the full term of three years from that time, who duly qualified and entered upon the duties of his office. That on the first day of March, 1880, the common council then being in session, McClintock presented to that body the following resignation, viz:

"MUNCIE, INDIANA, March 1st, 1880.

"*To the Mayor and Common Council, City of Muncie:*

"The undersigned respectfully tenders his resignation of the office of school trustee of the Muncie schools, to take effect from and after the 5th day of March, 1880.

(Signed)

"J. L. MCCLINTOCK."

The record of the proceedings of the common council shows that upon the presentation of the resignation, "on motion of Mr. Adamson, the resignation of Mr. McClintock was accepted." Thereupon the common council, at the same meeting and on the same day, elected the defendant Garrett D. Leech, as such trustee, to fill out the unexpired term of McClintock, resigned.

On the next day, March 2d, 1880, the city clerk issued to

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Leech a certificate of his election by the common council, as above stated.

Leech took the oath of office before the county auditor, and entered upon the discharge of his duties as such. The following allegations are found in the paragraph:

"That thereafter, on the 6th day of March, 1880, the said Garrett D. Leech entered upon the discharge of the office of school trustee of said city, claiming to be the successor of said John L. McClintock for his unexpired term, and has ever since continued to act as such trustee under such claim."

Afterward, at a meeting of the common council held on June 6th, 1881, that body proceeded to an election of a member of the board of school trustees of the city of Muncie, "to fill the place made vacant by the resignation of John L. McClintock," and elected the relator, Wysor, for the unexpired term of McClintock.

The city clerk issued to Wysor a certificate of his election, and the latter took the oath of office. The paragraph alleges "That thereafter and continuously until the present time, the said Harry Wysor has been ready and willing to discharge all of the duties of his said office, but has been prevented from the full performance thereof by the said defendant, and his claiming to be the rightful and legal school trustee as aforesaid, instead of the said Wysor, in place of the said McClintock. * * That the defendant has no rightful title to or claim to the possession of said office, but unlawfully usurps, intrudes himself into and holds and exercises said office, and unlawfully detains the possession of said office from the said Harry Wysor. That the said Wysor * * has and holds an interest in said office as rightful school trustee of said city, entitling him to file this information in his own relation."

Prayer for judgment establishing the relator's right to the office, and ousting the defendant, and for other relief.

The 5th section of the act to provide for a general system of common schools, 1 R. S. 1876, p. 780, provides that "The common council of each city, and the board of trustees of

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each incorporated town of this State, shall, at their first regular meeting in the month of June, elect three school trustees who shall hold their office one, two and three years respectively, as said trustees shall determine by lot at the time of their organization, and annually thereafter, shall elect one school trustee, who shall hold his office for three years. * * * All vacancies that may occur in said board of school trustees shall be filled by the common council of the city or board of trustees of the town, but such election to fill a vacancy shall only be for the unexpired term."

When Wysor, the relator, was elected in June, 1881, to fill out the unexpired term of McClintock, the defendant, Leech, was in possession of the office by the election of the common council to fill out the same term. He was an officer *de facto*, if not *de jure*, in the discharge of the duties of the office, and had been for the space of fifteen months. It may, perhaps, be questioned whether, when the office was thus filled by an officer *de facto*, having color of right and the insignia of title, the office could be said to have been *vacant* so as to authorize the election of Wysor, in the absence of any proper proceeding to have the supposed vacancy adjudged. But upon this point we make no decision. See, however, upon the question, *Harrison v. Simonds*, 44 Conn. 318; *Commonwealth v. Baxter*, 35 Pa. St. 263; *The State v. Jones*, 19 Ind. 356; *Yonkey v. The State*, 27 Ind. 236; *Thomas v. Burrus*, 23 Miss. 550; *Colton v. Beardsley*, 38 Barb. 29.

It seems to be established, that while the acts of an officer *de facto*, acting under color of lawful authority, are valid as respects third persons, yet, when he is sued for acts which he would have authority to do only as an officer, in order to justify, he must have been an officer *de jure*. See *Colton v. Beardsley*, *supra*; *Burditt v. Barry*, 13 Hun, 657; *The People v. Nostrand*, 46 N. Y. 375; *The People v. Weber*, 86 Ill. 283.

This principle, however, seems to us to have no application to the case before us, as the question here is whether the relator or the defendant is entitled to the office in question.

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But was not Leech, at the time of the election of Wysor, an officer *de jure* as well as *de facto*, holding under a valid election, and entitled to hold until the expiration of the term for which McClintock had been elected? We think he was.

It is claimed by the appellee that the election of Leech was a nullity, on the ground that there was no vacancy in the office at the time of the election, the time not then having arrived at which McClintock's resignation was to take effect; and authorities are cited to the proposition, that where authority is conferred to fill vacancies in office, not occurring by the expiration of regular terms, there can be no election in anticipation of the vacancy; that there must be an existing vacancy before it can be filled. *Nooe v. Bradley*, 3 Blackf. 158; *Biddle v. Willard*, 10 Ind. 62. The latter case seems to be relied upon by the appellee, but it differs very materially from the one under consideration.

The statute, we have seen, provides that "All vacancies that may occur in said board of school trustees shall be filled by the common council of the city," etc.

The question arises whether there was such a vacancy as is contemplated by the statute, at the time of the election of Leech to the office.

It seems to us that there was, and therefore that his election was valid, and that he is legally entitled to serve out the unexpired term of McClintock.

The common council, having the power to elect the trustees and fill vacancies in the office, had, as incidental thereto, the power to receive and accept resignations. 1 Dill. Munic. Corp., 3d ed., section 224; *State v. Boecker*, 56 Mo. 17.

The resignation of McClintock was, therefore, presented to, and accepted by, the proper authority.

In the case of *Biddle v. Willard*, *supra*, the court said, in defining what a resignation was, "To constitute a complete and operative resignation, there must be an intention to relinquish a portion of the term of the office, accompanied by the act of relinquishment."

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The resignation of McClintock evinced an intention to relinquish and did relinquish all that portion of his term which was to remain after the 5th day of March, 1880. The common council having accepted the resignation, the office became at once vacant as to the remaining portion of the term; and it was this vacancy which the common council proceeded to fill. There was, in our opinion, such a vacancy as the common council was authorized to fill.

We attach no special importance to the fact that the common council accepted the resignation of McClintock, as the modern doctrine seems to be that an officer has the absolute right to resign, and that his resignation, placed in the hands of the proper officer or body, vacates the office without an acceptance of the resignation. Dillon, at the section above cited and notes. McCrary on Elections, 2d ed., section 260.

In the case of *Biddle v. Willard*, *supra*, much stress is laid upon the fact that the Governor had not accepted the resignation of Judge STUART.

The court said: "The record nowhere shows us, in this case, that the prospective resignation of Judge STUART was ever accepted; and, therefore, it does not show that any special term, not known to the law, was created by it, if in any event there could have been, which might have been filled at the October election."

Whatever force there may have been in this view, it is obviated in the case before us, for here, as has been seen, the common council promptly accepted the resignation of McClintock.

It is not necessary to inquire whether McClintock, after he had presented his resignation to the common council, could, either before or after it had been accepted by that body, have withdrawn it by the consent of that body. If after its acceptance the common council had permitted him to withdraw it, the withdrawal might perhaps have been equivalent to a re-appointment. See *Bunting v. Willis*, 27 Grat. 144-155.

The case of *Biddle v. Willard*, *supra*, differs widely from the

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present in other respects than the non-acceptance, in that case, of the resignation.

In that case, Judge STUART had, in August, 1857, communicated to the Governor his resignation of the office of judge of this court, to take effect on the first Monday of the next January. In the mean time, at the October election of 1857, an attempt was made to fill the office by election for a full term. And the question was whether the election was valid.

If the Governor had accepted the resignation of Judge STUART, and had, before the first Monday of January, 1858, made an appointment to fill the vacancy, the appointee to hold until the office should be filled by a proper election, and the question had involved the validity of that appointment, the cases would have been nearer parallel. The main ground of the decision in that case was, that there was no vacancy, of which the electors were to be notified, authorizing an election to fill the office at the October election, 1857. The court said: "Section 5, chapter 19, 1 R. S., p. 223, requires the resignation of a judge to be communicated to the Governor, and to him alone; and we have been cited to no law, and we know of none, authorizing the Governor to communicate a knowledge of such resignation to any one else, and particularly to the public. And there being no law providing for such communication, the act of the executive, should he make it, would be of no legal effect—would in law, be no notice of the fact, any more than the unauthorized recording of any instrument in writing by the county recorder in his office, would be legal notice of the existence of such an instrument. But the duty prescribed to the Governor, upon the reception of a resignation creating a vacancy in a judicial office, is, to fill the vacancy by the appointment of another person as judge. This is all the notice he is required to give of the existence of the vacancy.

"Now, can it be believed for a moment, that it was the intention of the law that there should be an election to fill a vacancy of which the electors might not, necessarily, have any notice? * * * * *

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"Such was not the intention, for by section 2 of the act regulating elections, above quoted, it is made the duty of the various county officers to give notice to the public of the offices to be filled at the October election; and how could they give such notice in the case of a prospective vacancy, of which they themselves were not, necessarily, to be notified?"

In the case before us, the electors of the trustee, the common council, not only had notice of the vacancy, but accepted the resignation creating it, and accordingly proceeded to fill it.

The conclusion at which we have arrived, that the election of the appellant, Leech, was valid and entitled him to the office for the residue of McClintock's term, is not only right on principle, but is supported by authority. In the case of *Whitney v. Van Buskirk*, 40 N. J. L. 463, Whitney had held the office of chief of police of the city of Bayonne. On the 3d of December, 1877, he tendered his resignation of the office to the mayor and council of the city, to take effect on the 1st of January, 1878. The mayor and council accepted the resignation on the 4th of December, 1877, and on that day appointed Van Buskirk to the office, his appointment to take effect on the 1st of January, 1878.

On December 11th, 1877, the council reconsidered their vote of the 4th of that month accepting the resignation of Whitney, and confirming the mayor's nomination of Van Buskirk; but the mayor did not concur in the reconsideration. The council thereupon re-passed the resolution to reconsider, by a two-thirds vote. The question was, whether Whitney or Van Buskirk was entitled to the office; and it was held that the resignation of Whitney, thus accepted, put an end to his right to the office after January 1st, 1878, and that the appointment of Van Buskirk was valid and entitled him to the office after that time, notwithstanding the proceedings of December 11th, 1877.

The view which we take of the question renders it unnecessary to consider whether, on the theory that Leech's appointment was voidable or void because made before McClintock's term expired, it would be void.

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tock's resignation took effect, the failure of the common council for fifteen months after that time to elect any other person, in the mean time suffering Leech to act as, and discharge the duties of, such trustee, might not be regarded as a ratification of his former appointment, or equivalent to a new one.

We are of opinion, for the reasons above stated, that the court below erred in overruling the demurrer to the paragraph of information in question.

A motion has been made to set aside a restraining order heretofore issued in the cause; but as the order has performed its office, and ceases to have force after the final disposition of the cause in this court, we suppose no formal order setting it aside is necessary.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

ELLIOTT, J., dissents.

WOODS, J., concurs in the principal point decided, but is of opinion that this court had no power to suspend the force of the judgment of the circuit court pending the appeal, by issuing a restraining order, and therefore that the order should be formally set aside and annulled.

ON PETITION FOR A REHEARING.

WORDEN, J.—A petition for a rehearing has been filed in this case, but, upon a reconsideration of the questions involved, we deem it unnecessary to add anything to what was said in the original opinion upon the main point in the case.

But the counsel for the appellant ask us to formally pass upon the motion to dissolve and set aside the restraining order which was issued by this court in the cause, and we proceed to do so.

A majority of the court are of opinion that the restraining order was properly issued, and there is, of course, no ground for setting it aside, as it has performed its functions and ceases with the final decision of the cause.

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If we are not entirely wrong upon the main point in the case, Leech the appellant was entitled to the office, but by the judgment below he was ousted from it, and another person was adjudged to be entitled to it. The error was apparent on the face of the record. The restraining order operated to hold things *in statu quo*, as if the judgment had not been rendered, until the decision of the cause in this court.

The Code of 1852, section 136, provides that "Restraining orders and injunctions may be granted by the Supreme Court in term time, when necessary and proper for the due exercise of the jurisdiction and powers of such court, or by any judge thereof in vacation," etc. Sec. 1147, R. S. 1881.

This statute we construe to mean that restraining orders, etc., may be issued by this court, or by any judge thereof in vacation, whenever it may be necessary and proper, in the exercise of its appellate jurisdiction, to preserve the rights of parties to a cause pending before it, until the decision of the cause by this court. The case before us is one in which it was, in our opinion, necessary and proper to issue such restraining order.

In many cases in this court, restraining orders have been issued to prevent advantage being taken of a judgment below until the determination of the cause here; though the reports may not show them, because in the opinions pronounced no notice has been taken of them.

The petition for a rehearing is overruled.

No. 8619.

REED v. WHITTON.

JUSTICE OF THE PEACE.—*Entry of Judgment.—Copy of Cause of Action*—Under section 18 of the act of June 9th, 1852, defining the jurisdiction, powers and duties of justices of the peace in civil cases (section 1437, R. S.

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1881), it is the duty of a justice to enter of record, in his docket, among other things, "a copy of the cause of action;" but his omission or failure to so copy the cause of action will not vitiate or avoid the judgment rendered thereon.

SAME.—*Summons and its Service.*—It is not necessary that the justice should copy the summons in the record of his judgment; a copy of the constable's return or a memorandum, showing service of the summons on the defendant, will be sufficient.

SAME.—*Judgment, Conclusive Evidence.—Collateral Attack.*—The judgment of a justice of the peace is conclusive evidence of the facts set forth therein; and it can not be attacked collaterally, or contradicted or impeached either by evidence or in pleading.

SAME.—*Evidence.*—The record of a justice's judgment and the pleadings and mesne or final process in the cause, when produced and properly identified, are competent evidence.

From the Benton Circuit Court.

M. H. Walker, D. Smith, J. H. Phares and W. M. Jones, for appellant.

J. C. Pearson, for appellee.

Howk, J.—In this action, the appellee sued to recover the possession of "one sorrel horse," whereof he alleged that he was the owner and entitled to the possession, and that the appellant had possession thereof, without right, and unlawfully detained the same from the appellee. Wherefore, etc.

The appellant answered by a general denial of the complaint.

The issues joined were tried by a jury, and a verdict was returned for the appellee; that he was the owner and entitled to the possession of the horse described in his complaint, of the value of \$50; that said horse was unlawfully detained by the appellant, and that, by reason of such detention, the appellee had sustained damages in the sum of one cent. Over the appellant's motion for a new trial, and his exception saved, the court rendered judgment for appellee on the verdict.

In this court, the only error assigned by the appellant is the decision of the circuit court in overruling his motion for a new trial.

The appellant claimed to be the owner of the horse in controversy, as the purchaser thereof at a constable's sale. In

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support of his claim, the appellant offered in evidence the record of a judgment rendered by a justice of the peace of Benton county, on the 8th day of March, 1879, in favor of Hattie B. and Henry G. Ellsworth and Alexander Reed, and against the said Robert Whitton. When this judgment was so offered in evidence, the bill of exceptions shows that the appellee objected to its admission, "for the reason that the record of the judgment does not contain a copy of the complaint, upon which the judgment is rendered, and because the record does not show that defendant was served with legal process, and because it is incompetent, irrelevant and void." This objection was sustained by the court, and to this ruling the appellant excepted.

Did the trial court err in this ruling? Was the judgment, so offered in evidence, absolutely void and of no effect, by reason of the fact that the justice of the peace, before whom the cause had been tried, had omitted, by oversight or otherwise, to record, in his docket, a copy of the plaintiff's complaint or cause of action? In section 18 of the act of June 9th, 1852, defining the jurisdiction, powers and duties of justices of the peace in civil cases, it is provided that "Every justice shall, in a substantial bound book of not less than two hundred pages, keep a docket, in which he shall record the proceedings in full, of all suits instituted before him, which record shall contain the names of the parties at full length, a copy of the cause of action and of the set-off of the defendant, if any, and all proceedings had therein, and the amount of the judgment written out in words; and every such record of each cause shall, when completed, be signed by such justice, and the cause noted in a proper index to be contained in such docket; and every clerk when he shall deliver to any justice his commission shall direct his attention to this section." 2 R. S. 1876, p. 608; Rev. Stat. 1881, sec. 1437.

On behalf of the appellee it is claimed that these statutory provisions are mandatory and not merely directory, and that, inasmuch as the judgment of the justice, offered in evidence in

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this case, did not contain "a copy of the cause of action" or plaintiff's complaint, it was void and incompetent evidence for any purpose. We are of the opinion that these positions can not be maintained. In *The Indianapolis, etc., Railroad Co. v. Wilsey*, 20 Ind. 229, suit had been commenced by the appellee before a justice, and, on appeal to the circuit court, the appellant had moved to dismiss the cause, because the justice had not copied the plaintiff's cause of action on his docket, as directed by the 18th section of the justices' act, and this motion had been overruled. On appeal to this court, it was held that, in this ruling, "there was no error." It is true, that this section 18, above quoted, is mandatory in its terms; but, while we think it is the duty of every justice to comply strictly with the mandates of the statute, in the discharge of his judicial duties, yet we can not assent to the position that his omission or failure to enter up his judgments in the precise mode or form prescribed in said section will vitiate and avoid such judgments. The statute is just as imperative in its requirements, in regard to the justice's docket and his index of cases, as it is upon any other subject; and yet it would hardly be claimed, as it seems to us, that the justice's judgments, if recorded in a defectively bound book of less than two hundred pages, or, if noted in an index *not* contained in his docket, would by reason of either fact be rendered invalid and void. These statutory requirements, although mandatory in form, seem to have been intended by the law-making power as guides and directions to justices of the peace in the discharge of their judicial duties; and, therefore, we think that a substantial compliance therewith ought to be held sufficient, even on an appeal from the judgment of the justice.

In the case at bar, the justice of the peace before whom the cause had been tried was a witness, and produced and identified, before the court and jury, his docket and the record therein of the judgment offered in evidence. At the same time the justice also produced and identified the complaint on which said judgment was rendered, the summons issued

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thereon by the justice for the appellee, and the constable's return of the service thereof endorsed on said writ, and the execution issued by the justice on said judgment, and the constable's return thereof showing his levy upon the horse in controversy, as the property of the appellee, and his sale thereof to the appellant, in satisfaction of said writ. These papers were severally offered in evidence by the appellant on the trial, and, on the appellee's objections thereto, were severally excluded from the jury.

The suit before the justice was commenced on March 3d, 1879, to recover the possession of certain real estate, particularly described, in Benton county, and damages for the unlawful detention thereof by said Robert Whitton, after the termination of his lease. On the same day the justice issued a summons for said Whitton to appear before him, at his office, on the 8th day of March, 1879, at 10 o'clock in the forenoon, to answer Hattie B. and Henry G. Ellsworth and Alexander Reed, in a complaint wherein they claim the sum of \$25.00 damages, and the possession of the property then held by the defendant, Whitton. This summons was returned by the constable, as follows: "I served this writ to Robert Whitton, by true copy, left at the last usual place of residence, March 3d, 1879." Afterwards, on the 8th day of March, 1879, a judgment was rendered by the justice, by default, in favor of the plaintiffs and against said Whitton, for the recovery of the real estate and damages and costs. On the 24th day of March, 1879, an execution was issued by the justice on said judgment to a constable of the county, who, on the same day, levied the writ on the horse in controversy, and advertised, sold and delivered the same to the appellant, Reed. This suit for the recovery of the horse was not commenced until January 19th, 1880.

It will be observed that, when the judgment of the justice was offered in evidence, the appellee objected to its admission, on the further ground that it did not show that he was served with legal process. It was not necessary that the

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record of the judgment should contain a copy of the summons issued for the defendant. In *Baldwin v. Webster*, 68 Ind. 133, it was held by this court that "it was not necessary that a copy of the summons issued by the justice should be set out in the record." In the case now before us, a copy of the constable's return of the summons, showing the service thereof on the appellee, Whitton, appeared in the record of the justice's judgment; "and this is all that is required or necessary in such a case." *Baldwin v. Webster, supra*.

But the judgment of a justice of the peace, where, as in this case, he has jurisdiction both of the subject-matter of the action and of the parties thereto, is valid, binding and conclusive, unless appealed from in the manner and within the time prescribed by law, and may be enforced by execution against the judgment defendant. Certainly, such a judgment can not be impeached or attacked in any such collateral suit or proceeding as the one now before us. "The court of a justice of the peace is a court of record" in this State. *Hooker v. State, ex rel.*, 7 Blackf. 272. In *Larr v. State, ex rel.*, 45 Ind. 364, in speaking of a judgment of a justice of the peace in this State, this court said: "It is conclusive evidence of the facts set forth in it, and if conclusive, then no evidence can be given to contradict or impeach it. If the finding and judgment can not be contradicted in evidence, neither can it [they?] be in pleading. Whilst it remains a matter of record and conclusive evidence, facts stated in it can not be controverted." So in *Pressler v. Turner*, 57 Ind. 56, it appeared that, in a suit before a justice on a promissory note executed by two joint makers, the justice's judgment showed upon its face that the summons issued in the case had been duly served on both makers of the note, and that a judgment by default had been accordingly rendered against both makers for the amount due on the note, which judgment was not appealed from. And, although it was afterward admitted that the summons had not in fact been served on one of the makers of the note, yet it was held by this court that the justice's judgment was bind-

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ing on the parties thereto, was conclusive evidence of the facts therein recited and set forth, and could not be impeached or contradicted in a collateral suit or proceeding. *Mavity v. Eastridge*, 67 Ind. 211; *Hume v. Conduitt*, 76 Ind. 598.

Our conclusion is, that the trial court erred in sustaining the appellee's objections to the justice's judgment, the complaint, the summons and the return thereof, and the execution and the return endorsed thereon, when offered in evidence by the appellant, and in excluding such evidence from the jury. For these errors of law, occurring at the trial and excepted to, and assigned by the appellant as causes for a new trial, his motion therefor ought to have been sustained.

The judgment is reversed, at appellee's costs, and the cause is remanded, with instructions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

No. 8660.

WHITE ET AL. v. THE BUTLER UNIVERSITY.

CORPORATION.—*Butler University.*—*Subscription.*—*Bond.*—*Stockholder.*—*Pleading.*—W. subscribed for ten shares of the stock of The Butler University. Instead of paying his subscription he gave a bond with surety as a borrower. In an action upon the bond, W. answered, 1. That by the articles of association and by-laws of the University each stockholder is entitled to a *pro rata* share of all profits, interest and accumulations accruing to it, and to have the same applied to satisfy any indebtedness to it from him; that large donations had been made to it, and interest and profits collected, so that W.'s share thereof exceeds the sum due upon the bond. 2. That the subscription was made upon the representation by the plaintiff's agent, that the subscriber would thereby acquire two perpetual scholarships which would readily sell for enough to pay interest on the amount subscribed, relying on which the defendant subscribed; that since that time the plaintiff has so changed its rules as to make admission and tuition free, thereby rendering the defendant's scholarships and stock of no value.

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Held, that the charter of the University is a public act, and it prohibits the distribution of its funds amongst stockholders and requires them to be used for the purposes of the institution, wherefore the first answer was bad.

Held, also, that because the second answer fails to allege that the representations made were false, and because, by its public charter, the institution had power to make its tuition free, the second answer was bad.

From the Bartholomew Circuit Court.

R. Hill and *J. W. Nichol*, for appellants.

J. M. Judah and *A. S. Caldwell*, for appellee.

ELLIOTT, C. J.—The appellee was incorporated in January, 1850, under the name of The North-Western Christian University, and this remained the corporate name until 1877, when it was changed to The Butler University. In 1865 the appellant subscribed for two shares of the capital stock of the corporation, but instead of paying his subscription he retained it as a loan from the University. To secure this loan he and the appellant Quick, his surety, executed the bond upon which this action is founded.

The first paragraph of the answer alleges that White is the principal and Quick the surety in said bond; that it was given in consideration of a subscription by White to the capital stock of the appellee; "that by the articles of association and by-laws, rules, and regulations of said corporation, each stockholder is entitled to his *pro rata* share of all profits, interest and accumulations arising from any source to and in favor of said corporation, and to have the same applied toward the satisfaction of any indebtedness" from any stockholder; that since the organization of the corporation it has received large donations from various sources, and has loaned large sums of money and received interest thereon, and the dividends and profits arising and accruing to White, as a stockholder, are largely in excess of the amount due upon the bond in suit.

We regard this answer as bad. It is bad for the reason, among others, that the corporation has no power to earn

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profits for division among its stockholders. The act incorporating the University is a public one, and it is therein declared that the objects and purpose of the corporation shall be to establish and sustain an institution of learning. It is further provided that the Board of Directors are empowered to expend not over one-third of the capital stock in ground and buildings for the college, but "*the balance of the said capital stock not so expended and applied shall be kept and retained as a permanent fund for the endowment of the institution, and may be loaned out, * * * interest to be used and applied to maintain, sustain and support such institution.*"

The provision of the charter which we have quoted forbids the distribution of profits among the shareholders, for such a distribution would be in direct violation of the clause that the balance of the capital stock not expended for college grounds and buildings shall be kept as a permanent endowment fund. If there were any doubts at all as to the power of the corporation under the provisions of the charter referred to, that doubt would be resolved against the appellants by section 15, which reads as follows:

"Sec. 15. From and after the opening of the institution, each stockholder whose stock is fully paid or secured, as herein contemplated, shall receive interest at the rate of six per cent. per annum on the amount of his or her stock, payable however, solely and exclusively in tuition in said institution, *at the usual rates for tuition therein*, when demanded, and payable to such stockholder, his or her order or assigns, at any time within ten years after such interest shall accrue."

It is very evident from these statutory provisions that the corporate officers had no power to make any by-law providing for a distribution of the revenues of the corporation among the shareholders. The object of the charter was to create an institution of learning and to enable it to secure and accumulate an endowment fund for the purpose of promoting the object for which the corporation was invested with corporate rights and powers.

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If it were granted that the corporation had power to declare and distribute dividends to its stockholders, the answer would still be bad. There is no averment that a dividend had been declared. A stockholder has no claim to a dividend until it has been declared. Mr. Field says: "A shareholder has no legal right to the profits of his shares until a division is made, and a contract by him in reference to dividends and profits upon his stock includes only dividends or profits ascertained and declared by the company and allotted to him, and not profits to be ascertained by third persons or courts of justice, upon investigations of the accounts and transactions of the company." Field Corp., section 103.

The second paragraph of the answer alleges that the agent of the appellee offered two shares of stock for sale to the appellant White; that the agent represented that if he would subscribe for the shares of stock he would become entitled to a perpetual scholarship in the University; that it would authorize him to send to such institution any person whom he chose; that such scholarship was transferable, and was then worth, and could be easily sold for, \$10 per year; that by this means he could realize enough to pay the interest on the amount of his subscription; that the appellee's agent then agreed with appellant that if he would agree to subscribe for the stock the appellee would not require the payment of the subscription, but would accept appellant's bond therefor; that the appellant, relying upon these representations and promises, and solely in consideration thereof, executed the bond sued on; that afterward, "the competent authorities of the University, by proper action," so changed the rules and regulations in regard to admission and tuition, as to make the tuition free to any and all persons, and thus deprived appellant of the benefit of his scholarship and rendered his stock valueless.

It is plain that this answer can not be upheld upon the ground that it states facts constituting fraud. The statements as to the value of the stock were mere expressions of opinion. Representations of value are not ordinarily deemed represen-

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tations of material facts. There is nothing to take this case out of the general rule. Commendations of the value or quality of a thing are not regarded as fraudulent representations. "*Simplex commendatio non obligat.*" *Neidefer v. Chastain*, 71 Ind. 363. If it were to be held that the representations concerning the value of the scholarship were binding and material, still the answer, if treated as stating a defence of fraud, would be insufficient, for the reason that it is not averred that this representation was untrue. No answer pleading the defence of fraud can be good without averring that the representations stated as the ground of defence are false.

The answer does not show a failure of consideration. Appellant contracted for and received two shares of stock, which entitled him to a scholarship in the university. It was for this that he contracted. There was no fraud. As appellant got what he contracted for, and was not deceived by any fraudulent representation, he can not defend against his bond. The rule, that where one gets the thing for which he knowingly bargains he can not complain, is a rudimental one, and fully applies to this case.

The answer does not aver that White did not get the thing he bargained for, but that it is of less value than he believed it to be. The stock and scholarship he obtained in accordance with the terms of his contract, and, therefore, received the full consideration which he demanded. In such a case there is no failure of consideration. The case of *Coil v. The Pittsburg Female College*, 40 Pa. St. 439, closely resembles the present. In the opinion there delivered it was said, in speaking of a plea very similar to that under consideration: "This is called a failure of consideration, but improperly. It is not averred that the defendant does not get the scholarship, in payment for which he gave his notes. It is not alleged that he does not obtain all that it was contemplated he should have when the contract was made. That the scholarship turns out not to be worth as much as he expected may be a misfortune, but it is not a failure of consideration."

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The appellant White was a corporator when the change was made in the rate of tuition. Those who made it were his representatives. His answer avers that the change was made by the competent "authorities of the University and by proper action," and it is therefore to be treated as an expression of the will of a majority of the corporators. At the time he made his subscription, he was bound to know the powers, rights and duties of the corporation of which he became a member, for these were defined by a public law. He was bound to know that the corporation had authority to make such changes respecting tuition as would promote the object for which the corporation was created. He must have known that the majority of the corporators possessed full control of all corporate affairs, with the authority to make all needful changes in the by-laws of the corporation. He had no right to expect that these by-laws should be like the laws of the Medes and Persians. As the corporation, in making the change, exercised a legal right in a legal manner, it can not be deemed to have injured any person, much less a corporator. It would be a complete subversion of fundamental principles to hold one subject to liability who had done what he might rightfully do, and in the manner which the law authorizes. By altering the by-law respecting tuition the corporation did not release stockholders or borrowers from their liability.

The answers were bad and the court did right in sustaining the demurrer of the appellee.

Judgment affirmed.

No. 8370.

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PARTNERSHIP.—*Real Estate.*—*Conveyance.*—*Sheriff's Sale.*—*Tenants in Common.*—*Notice.*—A conveyance to two, by deed in the usual form, vests in

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each of the grantees the legal estate to an undivided half as tenant in common (section 2922, R. S. 1881), and if, in fact, the grantees be partners, and the estate partnership property, yet a *bona fide* purchaser at sheriff's sale upon execution against one of the grantees, without notice of the fact, will hold title to the moiety, against partnership creditors seeking to subject it to their demands.

SAME.—*Instruction.*—*Jury.*—*Practice.*—In such a case, an instruction which does not leave to the jury the question of notice to such purchaser at sheriff's sale, is erroneous.

From the Clay Circuit Court.

G. A. Knight, C. H. Knight and W. P. Blair, for appellants.
W. W. Carter and S. D. Coffey, for appellees.

NEWCOMB, C.—The appellees, Hadley and Willoughby, sued to foreclose a mortgage executed to them by Jacob Thomas and Isaac W. Sanders.

Among the defendants was Robert M. Wingate, the ancestor of the appellants, who has died since the judgment, and this appeal is prosecuted by his heirs.

The complaint alleged that the note secured by the mortgage was a partnership debt; that it was given for money borrowed to make a payment on said land, purchased by Thomas and Sanders as partners, and that said land was held by them as partners.

Wingate filed an answer and cross complaint, alleging that he was the owner of one-half the land by virtue of a sheriff's sale of Thomas's half of the land, and a deed made pursuant to such sale; and that he held by assignment several certificates of purchase of the interest of Sanders in said land, executed by the sheriff of Clay county pursuant to sales made by him on certain executions against said Sanders, issued upon judgments which were prior liens to the mortgage of the plaintiffs. A denial was filed to the answer and cross complaint. The cause was then tried by a jury, which found a general verdict for the plaintiffs, and specially, in answer to interrogatories, that the debt sued upon was a partnership debt of Thomas & Sanders, and that the mortgaged land was their partnership property. Various exceptions were reserved by the de-

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fendant Wingate upon the trial, which, as well as the overruling of his motion for a new trial, were properly saved by bills of exception.

The evidence gives the following history of the facts on which the parties respectively base their claims to the land in controversy, namely :

That Thomas & Sanders purchased said land and took a title bond therefor in their individual names, August 13th, 1873. This was followed by a deed to them, September 18th, 1873. The deed was to Jacob Thomas and Isaac W. Sanders, in the ordinary form, there being nothing to indicate that they purchased as partners. The purchasers had no joint fund, but each paid one-half of the purchase-money from his own means, so far as payment was made at the dates of the purchase and the deed. On February 16th, 1874, Thomas & Sanders borrowed of the plaintiffs \$1,000, to make a payment of that amount upon said real estate, and executed their joint note, signed in their individual names therefor ; and on November 23d, 1877, they, with their wives, executed the mortgage in question to secure the payment of said note to the plaintiffs. This land was purchased by Thomas & Sanders with a view to lay it out into lots as an addition to the town of Brazil, and they prepared a plat of the same, but the plat was never acknowledged or recorded, and the anticipated speculation proved a failure.

This land was the only property ever owned by Thomas & Sanders, either jointly or in common.

Wingate claimed under the following judgments and sheriff's sales :

Judgment of Austin W. Knight v. Jacob Thomas, rendered May 29th, 1877. Sale of Thomas's undivided half of the land in controversy, by virtue of an execution issued on said judgment, January 11th, 1879, to Robert M. Wingate for \$474.61, who received a certificate of purchase from the sheriff.

Judgment in favor of Wm. Burrick v. Isaac W. Sanders, rendered June 8th, 1875. The sheriff's certificate of purchase was issued to Charles H. Knight, on sale of Sanders's

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undivided half of said land to satisfy this judgment, January 19th, 1878, and the certificate was assigned to Wingate, December 9th, 1878. The bid at the sheriff's sale was \$276.33. Judgment of Andrew Wallace *et al.* v. Sanders, rendered June 8th, 1877. Sheriff's certificate of purchase on same was issued to Joseph M. Wallace, May 25th, 1878, and by him assigned to Wingate, December 9th, 1878. Bid at sheriff's sale, \$279.

Judgment of Charles S. Andrews v. Sanders, rendered June 27th, 1877. Execution sale to Robert L. Keith, February 22d, 1878, for \$405.05. Certificate of purchase assigned to Wingate, May 9th, 1878. A sheriff's deed was duly issued to Wingate on his purchase of Thomas's share of the land on the Austin W. Knight execution. This foreclosure proceeding was commenced March 15th, 1879.

On these facts and the finding of the jury that Thomas & Sanders owned the land as partners, and that the note to plaintiffs was their partnership debt, the plaintiffs claim that as such partnership creditors they are entitled to satisfaction out of the partnership property in preference to the judgment creditors of Thomas and Sanders individually.

On the other hand, it is claimed for Wingate that he and his assignors were purchasers for value, without any notice of said alleged partnership, and that he consequently had the better title.

The law is well settled, as a general rule, in this State, that partnership creditors are entitled to preference in the payment of their claims out of the proceeds of partnership property, and that creditors of the individual partners are entitled only to so much as would be the distributive portion of the debtor partner on a final winding up of the partnership. *Matlock v. Matlock*, 5 Ind. 403; *Kistner v. Sindlinger*, 33 Ind. 114; *Coffin v. Mitchell*, 34 Ind. 293; *Smith v. Evans*, 37 Ind. 526; *Huston v. Neil*, 41 Ind. 504; *Donellan v. Hardy*, 57 Ind. 393; *Meridian National Bank v. Brandt*, 51 Ind. 56; *Conant v. Frary*, 49 Ind. 530.

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But this, like most general rules, is subject to qualification, and is not to be enforced against parties having the legal estate and equal equities. Thus, where the apparent title is in one member of a partnership, and a purchaser from him is ignorant that it is partnership property, such purchaser will hold against the other partners and the partnership creditors. 1 Washburn Real Prop. 667-669; 3 Kent's Com. p. 38. So, when the estate is apparently a tenancy in common, though in fact it is partnership property, one partner may convey a good title to his apparent share as a tenant in common, to a *bona fide* purchaser. On this point, FIELD, C. J., said, in *Dupuy v. Leavenworth*, 17 Cal. 263, that "the real property of a copartnership may be conveyed by one partner, on his individual account, to the extent of his legal title, so as to cut off the equitable rights of the copartnership, or its liability to the payment of the copartnership debts. A *bona fide* purchaser, for a valuable consideration, without notice of the partnership character of the property, will take the title in such cases, freed from the equitable claims of others, upon grounds of the highest policy." See, also, *Crooker v. Crooker*, 46 Me. 250; *Hoxie v. Carr*, 1 Sumn. 173; *Forde v. Herron*, 4 Munf. 316; *Buck v. Winn*, 11 B. Mon. 320; *Johnson v. Clark*, 18 Kan. 157; *Hogle v. Lowe*, 12 Nev. 286; *Van Slyck v. Skinner*, 41 Mich. 186; *Hiscock v. Phelps*, 49 N. Y. 97; *Lewis v. Anderson*, 20 Ohio St. 281; *Meridian Nat. Bank v. Brandt*, 51 Ind. 56; *Parker v. Bowles*, 57 N. H. 491.

Chapter 82 of the Revised Statutes (1 R. S. 1876, p. 361) contains the following provisions:

"Sec. 7. All conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common and not in joint tenancy; unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy.

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“Sec. 8. The preceding section shall not apply to mortgages, nor to conveyances in trust, nor when made to husband and wife; and every estate vested in executors, or trustees as such, shall be held by them in joint tenancy.”

By this statute, the effect of the deed to Thomas and Sanders was to vest in each of them the legal title to an undivided half of the premises as tenants in common. As such, either could sell and convey a good title to his moiety, or it could be levied upon and sold to satisfy judgments and executions against him. These legal rights and liabilities might indeed be qualified by the owners actually making the land partnership assets, in which case it would become subject to the usual equities attaching to partnership property, as between the partners and between them and their creditors, and as to purchasers from the individual partners, with notice of the partnership character of the property.

The separate judgments against Thomas and Sanders became liens from the date of rendition on their respective legal estates in the land; and a *bona fide* purchaser at sheriff's sale of their individual interests, without notice of any change from the statutory *status* of the title, would acquire the legal title as it existed at the date of the judgment, irrespective of partnership equities of which he had no notice.

A general judgment lien is subject to the equitable rights of third parties, so long as it remains a mere lien; but, if such equitable rights are not asserted before a sale on execution, they must yield to the title of a *bona fide* purchaser under the execution. *Gifford v. Bennett*, 75 Ind. 528; *Rooker v. Rooker*, 75 Ind. 571; *Milner v. Hyland*, 77 Ind. 458.

It was, therefore, a vital question in the case, whether Wingate, when he purchased under the Burrick judgment and execution, knew or had notice that the land was in fact partnership property; and whether the purchasers, under the several executions against Sanders, had such notice, and, if they had, whether Wingate had notice when he bought and took assignments of their certificates of purchase. If said assign-

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ors bought, and paid their money without such notice, their assignee, Wingate, would be protected by the *bona fides* of their purchases, although he may have had notice. *McShirley v. Birt*, 44 Ind. 382; *Etzler v. Evans*, 61 Ind. 56; 2 Sugden Vendors, 8th Am. ed., 522; Story Eq., secs. 409-410.

The court, at the instance of the plaintiffs, gave to the jury the following instruction:

"6th. The claim of the defendant Wingate to the property described in the complaint is based on what is called judicial sales. A purchaser at a judicial sale acquires no greater rights than the owner of the property sold had in it. And if you find from the evidence in the cause that the property described in the complaint was the partnership property of Thomas & Sanders, and that the debt now in suit is their partnership debt, then the sale to Wingate did not cut out the rights of the plaintiffs to have said note paid out of said property, in preference to the individual claims against Sanders and Thomas, and the plaintiffs may enforce such right against the property in the hands of Wingate to the same extent they might enforce the same if Sanders and Thomas still held it."

According to the authorities to which we have referred, this instruction was too broad. It ignored the question of notice of the plaintiffs' alleged equities to the purchasers at the sheriff's sales, and left but two questions for the jury to pass upon, namely, whether the land was in fact partnership property, and whether the debt sued for was a partnership debt. Some evidence was given by the plaintiffs tending to show that Wingate had notice that Thomas and Sanders held the land as partners, and counter evidence was given on that subject on behalf of Wingate. Whether he had such notice was a question for the jury, but the court took that question from them and virtually instructed them to find a verdict without reference to it.

We think, from an examination of the evidence, that the verdict was the result of the instruction above quoted. It follows, therefore, that the judgment ought to be reversed, and the cause be remanded for a new trial.

Kusler et al. v. Crofoot.

Various other alleged errors have been discussed by counsel, but as they relate to rulings on the trial that may not again occur, we do not deem it necessary to consider them.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be, and the same is in all things hereby, reversed, at the costs of the appellees Asa Hadley and John Willoughby, and that said cause be remanded to the Clay Circuit Court, with instructions to grant the appellants a new trial, and for further proceedings in accordance with said opinion.

No. 7732.

KUSLER ET AL. v. CROFOOT.

ACCORD AND SATISFACTION.—*Judgment.—Promissory Note.—Answer.*—In an action upon promissory notes, an answer that the notes were given to satisfy a judgment, and that the payee did not enter satisfaction, as he agreed, before their maturity and before the death of the judgment debtor, but failing to aver that satisfaction thereof had not been made before the commencement of the action, is insufficient on demurrer.

SAME.—*Acceptance and Withdrawal.*—An accepted accord makes satisfaction. To prevent satisfaction, the proposition for accord must be withdrawn before acceptance.

SAME.—*Satisfaction of Record.*—An acceptance of notes in satisfaction of a judgment debt discharges the debt, and satisfaction of record may be enforced at any time.

EVIDENCE.—*Mortgage.—Special Non Est Factum.—Delivery.—Practice.—Harmless Error.—Execution.*—Upon trial of an issue formed upon an answer of *non est factum*, denying only the delivery of a mortgage sued on, it is harmless error to permit the plaintiff to introduce the mortgage in evidence and then make proof of its delivery. Delivery is a necessary part of the execution of a written instrument.

SAME.—*Transcript.—Placita.—Foreign Judgment.*—It is not error to refuse to admit in evidence a transcript of a judgment rendered in another State,

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167	593

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which contains no *placita* and does not show the date of the judgment, and does not profess to contain a complete copy of the proceedings in the case.

From the Harrison Circuit Court.

B. P. Douglass and *S. M. Stockslager*, for appellants.

L. Jordan, *W. T. Jones* and *S. J. Wright*, for appellee.

FRANKLIN, C.—Appellee brought suit on three promissory notes executed to him by one Frank Kusler, Jr., as principal, and the other appellants as sureties, and to foreclose a mortgage executed by appellants Frank Kusler, Sr., and wife, to secure the payment of the notes.

The defendants answered jointly, in five paragraphs; the 2d, 3d and 4th were separately demurred to, and demurrers sustained. The defendants Frank Kusler, Sr., and wife, answered separately by a special *non est factum*, that the mortgage was never delivered. Issues were formed, trial by the court, finding and judgment for appellee.

Appellants have jointly assigned for errors the sustaining of the demurrers to the 2d, 3d and 4th paragraphs of their answer, and the overruling of their motions for a new trial.

Appellants Frank Kusler, Sr., and wife, have separately assigned for errors:

1st. The overruling of their motion for a new trial.

2d. For sustaining appellee's motion to strike out their motion for judgment notwithstanding the finding of the court.

3d. Overruling their motion in arrest of judgment.

Appellant Genthart separately assigned for errors:

1st. The overruling of his demurrer to the 4th paragraph of appellee's answer to his cross complaint.

2d. For sustaining appellee's motion to strike out his motion for judgment notwithstanding the finding of the court.

3d. Overruling his motion in arrest of judgment.

Appellants Frank Kusler and wife and Genthart separately assigned for error, the overruling of their motion to modify and correct the judgment.

Kusler *et al.* v. Crofoot.

The death of appellee, and the appointment of Jacob P. Goodson as his executor, since the filing of this appeal, have been suggested in the record.

The 2d, 3d and 4th paragraphs of appellants' joint answer each substantially stated that the notes were executed for and in consideration of a judgment indebtedness due from said Frank Kusler to appellee, for one thousand dollars and interest from the year 1864; that Kusler delivered them to appellee in October, 1872, in satisfaction of said judgment; that appellee received them, agreeing to enter satisfaction of the judgment; that he did not enter said satisfaction prior to the maturity of the notes and the death of the judgment debtor, which death occurred in May, 1876; that the arrangement remained an unexecuted proposition until the death of the principal, and that his death operated as a withdrawal of the proposition and thereby released all the parties from any liability on the notes.

Neither of these paragraphs states facts sufficient to constitute a defence. There was no averment in either of the paragraphs of answer that satisfaction of the judgment had not been entered of record before this suit was brought.

A promise is a sufficient consideration to support a promise. The acceptance of a new obligation for a less sum, with additional security, in agreement of satisfaction, operates as a discharge of the old, and satisfaction can, at any time, be enforced. An accepted accord makes satisfaction. To prevent satisfaction, the proposition for accord must be withdrawn before its acceptance.

When the appellee accepted the notes in satisfaction of the judgment debt, and agreed to enter satisfaction of the judgment, the judgment was thereby satisfied, and satisfaction of record could have been enforced at any time afterward. 2 Pars. Con. 683; 2 Greenl. Evidence, sections 28 and 31.

Counsel for appellants have referred us to the case of *Heeg v. Weigand*, 33 Ind. 289, and *Armstrong v. Cook*, 30 Ind. 22. Neither of these cases is applicable to the facts in this case.

Kusler *et al.* v. Crofoot.

We see no error in sustaining the demurrer to these paragraphs of answer.

The third cause assigned in the joint motion for a new trial was the rejection, in evidence, of the transcript of the judgment in the common pleas court of Jefferson county, Kentucky, which was the basis of the notes sued upon.

The blank *placita* in the beginning of the transcript did not show the date of the rendition of the judgment, and the transcript did not profess to contain a complete copy of the proceedings in the case. There was no error in rejecting the transcript as evidence.

Under the separate assignment of errors by Frank Kusler, Sr., and wife, in their motion for a new trial, they complain of the admission in evidence of the mortgage to appellee, before proof had been made of its execution. Their answer was a special and not a general *non est factum*. They admitted the signing of the mortgage, but denied its delivery. Under this answer, the plaintiff, having possession of the instrument, and its signature being admitted, had a right to introduce the mortgage as evidence and then make his proof as to the delivery, which was done. *Pate v. First Nat'l Bank, etc.*, 63 Ind. 254; *Brooks v. Allen*, 62 Ind. 401; *Carter v. Pomeroy*, 30 Ind. 438; *State, ex rel., v. Blair*, 32 Ind. 313.

But if this was error, it was harmless, for the reason that when proof had been made of the delivery of the mortgage, it would then undoubtedly have been admissible as evidence.

Counsel for appellant have referred us to a number of authorities to establish the principle, that a delivery is a necessary part of the execution of an instrument. This is too plain a proposition to need the citation of authorities.

We find no available error in the introduction of the mortgage as evidence.

None of the other assignments of error have been discussed or insisted upon by counsel, and therefore may all be considered as waived.

We see no available error in this record.

Cole v. Matchett et al.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and the same is hereby, in all things affirmed, at the costs of appellants.

Opinion filed at May term, 1881.

Petition for a rehearing overruled at November term, 1881.

No. 8458.

BENSON, ADM'R, v. LIGGETT.

From the Cass Circuit Court.

D. B. McConnell, for appellant.

R. Magee and *N. O. Ross*, for appellee.

WOODS, J.—This case is in all essential respects identical with *Benson, Adm'r, v. Liggett*, ante, p. 452, and on the authority of that case is affirmed, with costs.

Affirmed.

No. 8674.

COLE v. MATCHETT ET AL.

From the Kosciusko Circuit Court.

C. Clemans and *A. C. Clemans*, for appellant.

L. H. Haymond and *L. W. Royse*, for appellees.

HOWK, J.—In this case, the facts alleged in the appellant's complaint, and the question for decision, are substantially the same in every material particular, and presented in the same manner, as those which were fully considered and passed upon by this court in the recent case of *Ward v. Haggard*, 75 Ind. 381. The case cited was approved and followed in *Kelsey v. McLaughlin*, 76 Ind. 379. The cases cited are decisive of the case now under consideration. The court did not err in sustaining the appellees' demurrer to the appellant's complaint.

The judgment is affirmed, at the appellant's costs.

Jones *et ux.* v. McElwee.

No. 8323.

WILBORN ET AL. v. STOCKER, ADM'R.

From the Madison Circuit Court.

J. A. Harrison, R. Lake, W. March and E. P. Schlater, for appellants.

M. S. Robinson and J. W. Lovett, for appellee.

WOODS, J.—The controlling question in this record was decided adversely to the appellants in the recent case of *Brannock v. Stocker*, 76 Ind. 558.

The judgment in this case is therefore affirmed, with costs.

No. 8477.

JONES ET UX. v. MCELWEE.

From the Tipton Circuit Court.

J. W. Robinson and D. Waugh, for appellants.

J. W. Parks, J. D. McClaren, R. B. Beauchamp, G. H. Gifford, R. Vaile and J. F. Vaile, for appellee.

WOODS, J.—This case is in all essential respects identical with the case of *Jones v. Parks*, *ante*, p. 537.

The judgment of the circuit court is therefore affirmed, with costs.

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4. *Construction.—Unimportant Parts Suppressed.—County Bounties to Soldiers for Particular Regiment.—Enlistment Under Offer and Service in Another Regiment.*—It is a rule of construction that a contract should be upheld rather than defeated. Force and validity will be given to all its parts and terms, if possible, but comparatively unimportant parts will be disregarded, if in that way only the contract can be sustained, especially where the party seeking relief has performed the service required of him, and in the manner required, except in unimportant particulars, which, without his fault, were put beyond his control. A county, authorized thereto by law, offered bounties for the enlistment and service of soldiers in the 69th regiment Indiana volunteers. A. accepted the offer and enlisted for that regiment, but, without his consent, was mustered into and served in the 84th regiment.

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Held, in an action by B. against R., that he could recover the amount so paid.

Held, also, that R.'s promise to W. inured to the benefit of B., who, having discharged the debt, was entitled to be subrogated to the right of action which W. would have had against R. if he had paid it himself.

Held, also, that the holder of the note might have sued R. upon his promise, but the fact that he chose to sue the makers, and not to accept R.'s promise, did not deprive B. of the benefit of the promise.

Held, also, that, after taking judgment against the makers, the holder might still have accepted and sued upon R.'s promise, and, by paying the judgment, B. became subrogated to this right of the holder.

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CORPORATIONS.

See BANK; BENEVOLENT SOCIETY; CITY; MORTGAGE, 3 to 5; PARTNERSHIP, 4, 12, 15.

Butler University.—Subscription.—Bond.—Stockholder.—Pleading.—W. subscribed for ten shares of the stock of The Butler University. Instead of paying his subscription he gave a bond with surety as a borrower. In an action upon the bond, W. answered, 1. That by the articles of association and by-laws of the University each stockholder is entitled to a *pro rata* share of all profits, interest and accumulations accruing to it, and to have the same applied to satisfy any indebtedness to it from him; that large donations had been made to it, and interest and profits collected, so that W.'s share thereof exceeds the sum due upon the bond. 2. That the subscription was made upon the representation by the plaintiff's agent, that the subscriber would thereby acquire two perpetual scholarships which would readily sell for enough to pay interest on the amount subscribed, relying on which the defendant subscribed; that since that time the plaintiff has so changed its rules as to make admission and tuition free, thereby rendering the defendant's scholarships and stock of no value.

Held, that the charter of the University is a public act, and it prohibits the distribution of its funds amongst stockholders and requires them to be used for the purposes of the institution, wherefore the first answer was bad.

Held, also, that because the second answer fails to allege that the representations made were false, and because, by its public charter, the institution had power to make its tuition free, the second answer was bad. *White v. Butler University, 585*

COSTS.

*Justice of the Peace.—Judgment.—Circuit Court.—Statute Construed.—*Under section 70, 2 R. S. 1876, p. 627, a judgment in the circuit court for the recovery of property sued for and eight dollars damages will not entitle the defendant to costs, against whom judgment before the justice was simply for the recovery of the property and costs. Reduction of

the judgment must be ascertained by a comparison of the judgments, and not the verdicts. *Balliett v. Humphreys, 388*

COUNTER-CLAIM.

See MARRIED WOMAN.

COUNTERFEITING.

See CRIMINAL LAW, 17, 18.

COUNTY COMMISSIONERS.

See HIGHWAY, 6, 7.

COUNTY TREASURER.

See TAXES.

COURTS.

See CRIMINAL LAW, 9, 10; COSTS; FIXTURES, 2, 3; PRACTICE, 10, 11.

CRIMINAL LAW.

See LIQUOR LAW.

1. *Sale of Meat of Diseased Animals.—Statute Construed.*—To constitute an offence, under sec. 2070, R. S. 1881, in the sale of meat of diseased animals, or having the same with intent to sell, it was intended that the sale, or intended sale, must be for food, and that the defendant must have knowledge of the bad quality of the meat. *Schmidt v. State, 41*
2. *Same.—Pleading.—Indictment.*—Where, by construction, a meaning is put upon a statute defining an offence, which is not so broad as the general words of the statute, it is not sufficient to charge the offence in the words of the statute, but the indictment must bring the case also within the meaning of the statute. *Ib.*
3. *Former Conviction.—Evidence.*—It is necessary for one who relies upon evidence of a former conviction to show that the offence for which he was convicted is the same as that involved in the prosecution in which the evidence is offered. *Jenkins v. State, 133*
4. *Same.—Transcript.—Omission of Warrant.—Evidence.—Assault and Battery.*—As a rule, the entire record of a cause should be offered in evidence, and not mere fragmentary parts thereof; but the omission of the warrant from the transcript of a judgment of conviction for an assault and battery, before a justice of the peace, where the entries show that both the defendant and injured person were present when the case was heard and determined, is immaterial. *Ib.*
5. *Same.—Justice of the Peace.—Jurisdiction.—Statute Construed.*—Under section 1637, R. S. 1881, justices of the peace have jurisdiction to try and determine all cases of misdemeanors where the punishment may be by a fine only. *Ib.*
6. *Justice of the Peace.—Jurisdiction.—Statute Construed.*—Under the provisions of the Revision of 1881, justices of the peace have jurisdiction in all cases of misdemeanors where a fine is the only punishment that must be inflicted, though imprisonment in the county jail might, but need not necessarily, be imposed. *State v. Creek, 139*
7. *Suffering Escape of Prisoner.—Indictment.—Warrant.*—Where an officer, whose duty it is to have the custody of a prisoner charged with or convicted of an offence against a law of this State, negligently suffers such prisoner to escape out of his custody, the offence of such officer is a misdemeanor, punishable by fine only. But the inapt use of the adverb "feloniously," in the description of the offence, furnishes no ground for quashing the indictment; nor was it necessary to the sufficiency of the indictment that it should charge that the officer had the prisoner in his custody by virtue of a sufficient warrant, or that it should set out a copy of the warrant. *State v. Sparks, 166*

8. *Larceny.—Affidavit.—Indictment.*—Where, upon the face of an affidavit or indictment, the property alleged to have been stolen appears to have been personal, the failure to aver that the property was personal affords no ground of objection to the affidavit or indictment.
Mountjoy v. State, 172
9. *Same.—Presumption.—Clerk.—Signature.*—Courts take judicial notice of the names and signatures of their officers, and where the word "clerk" is added to the signature attached to the jurat of an affidavit in a criminal prosecution in the circuit court, it will be presumed to be the signature of the clerk of that court. *Ib.*
10. *Same.—Seal.—Jurat.*—The seal of a court need not be attached to the jurat of an affidavit sworn to before its clerk, and to be used only in such court. *Ib.*
11. *Same.—Judgment.—Supreme Court.*—As a rule, in criminal as well as in civil cases, a party present in court when a judgment is rendered against him, and failing to object thereto, can not complain of it in the Supreme Court. *Ib.*
12. *Vagrancy.—Affidavit.*—An affidavit charged that, on, etc., at, etc., "J. C., an able-bodied male person, who has arrived at years of discretion, was then and there unlawfully found without any visible means of support, and then and there unlawfully found loitering and idling in and about the saloon of F. and the saloon of W., which said saloons were then and there tippling-houses, * * without being there engaged in some useful employment," is a sufficient charge of vagrancy in a prosecution before a justice of the peace, under the act of 1877, Acts 1877, Spec. Sess., p. 80. *State v. Cummins, 251*
13. *Same.—Duplicity.—Pleading.*—Duplicity is no ground for quashing an affidavit or indictment. *Ib.*
14. *Injuring Toll-Gate.—Turnpike.—Highway.—Presumption.—Instructions.—Evidence.*—In the absence of the evidence given upon the trial of a person indicted for unlawfully injuring a toll-gate, 2 R. S. 1876, p. 479, sec. 66, instructions correctly defining the rights of the travelling public over turnpikes constructed upon existing highways will be presumed applicable to the evidence. *Parker v. State, 259*
15. *Public Offences.—Statute Construed.*—Where the act of April 14th, 1881, Acts 1881, p. 174, defines an offence described in earlier statutes, it abrogates the provisions of such statutes. *Johns v. State, 332*
16. *Same.—Desecration of Sabbath.—Constitutional Law.*—The 95th section of the act of April 14th, 1881, Acts 1881, p. 194, does not grant immunities to one class of citizens which, upon the same terms, shall not belong to all, and is constitutional and valid. *Ib.*
17. *Counterfeiting.—Jurisdiction.*—The courts of this State have jurisdiction, as prescribed by statute, to punish the offence of counterfeiting the coin of the United States current in this State. *Dashing v. State, 357*
18. *United States Statutes Construed.—Crimes.*—Section 711 of the Revised Statutes of the United States, construed with section 5328, does not divest the States of the right and jurisdiction to enact and enforce their own criminal laws, though the acts made criminal thereby might also be made criminal by the laws of the United States. *Ib.*
19. *Indictment.—New Trial.—Evidence.*—Where the evidence fails to show that the defendant is guilty of the offence charged in the indictment, his conviction will be contrary to law, and a new trial must be granted. *Stout v. State, 492*

CROPS.

See REPLEVIN, 12 to 15.

CROSS COMPLAINT.

See MARRIED WOMAN; MORTGAGE, 14; PLEADING, 20; PRACTICE, 13.

DAMAGE.

See CITY, 1, 3, 9, 18; CONTRACT, 1; DEED, 8; EASEMENT, 2; HIGHWAY, 4; MASTER AND SERVANT; NEGLIGENCE; TOWNSHIP TRUSTEE, 2; TRADE MARK.

DECEDENTS' ESTATES.

See DEED, 1; DESCENT; JUDGMENT, 3; MECHANIC'S LIEN, 1; MORTGAGE, 9; 11; PLEADING, 13, 14, 15; PRINCIPAL AND AGENT, 1.

1. *Debts.*—The personal estate of a decedent is the primary fund for the payment of his debts. *Chandler v. Chandler*, 417
2. *Same.—Heirs.*—Without administration, an action can not be maintained against the widow and heirs of a decedent, by a creditor, to recover a debt due from the decedent. *Ib.*
3. *Same.—Vendor's Lien.—Pleading.—Judgment.*—In an action against a widow and heirs of a decedent, to enforce a vendor's lien against the real estate of a decedent, it is error to render a judgment directing the sale of the real estate, without first exhausting the personalty, unless the complaint avers the insufficiency of the personal property to pay the debt.
- Query:* Whether an action will lie, by a creditor of a decedent, against his widow and heirs alone, to enforce a vendor's lien for a debt due by the decedent on the purchase of real estate. *Ib.*
4. *Widow.—Expenses of Funeral and Last Sickness.*—If a widow accepts or procures the entire estate to be delivered to her as being worth less than \$500, she becomes liable for the reasonable expenses of the funeral and last sickness of the deceased husband. *Green v. Weaver*, 424
5. *Practice.—Suits By or Against Executors, Administrators or Guardians.—Parties as Witnesses.*—Under the first proviso in section 2 of the act of March 11th, 1867, defining who should be competent witnesses in all suits where a judgment might be rendered either for or against the estate represented by an executor, administrator or guardian, neither party was allowed to testify as a witness, unless required by the opposite party, or by the court trying the cause. *Wrape v. Hampson*, 499

DECLARATIONS.

See CITY, 2; PROMISSORY NOTE, 5.

DEDICATION.

See HIGHWAY, 1 to 5.

DEED.

See EASEMENT, 1; EJECTMENT, 1; MARRIED WOMAN; MISTAKE; PARTNERSHIP, 21; REPLEVIN, 13 to 15; SHERIFF'S DEED; SHERIFF'S SALE; VENDOR AND PURCHASER, 5, 7.

1. *Warranty.—Seizin.—Breach.—Decedents' Estates.—Parties.—Heir.*—Where a covenant of warranty was broken in the lifetime of the covenantee, and possession was by him surrendered to the holder of the paramount title, and the covenantee has died, the action should be brought by the administrator and not by the heir. *Wilson v. Peelle*, 384
2. *Same.—Paramount Title.—Complaint.*—In such action the complaint must show that the title to which possession was surrendered was paramount to that of the grantor of plaintiff's intestate and of all other persons. *Ib.*
3. *Same.—Fee Simple.*—In such complaint an averment that the paramount title was in fee simple imports that it was the highest and most ample of all estates. *Ib.*
4. *Same.—Eviction.—Partition.—Evidence.*—On trial of such action, a judgment in a partition proceeding, where the question of title was in issue, is competent evidence to prove the eviction of the covenantee, but not to prove the paramount title by which he was evicted. *Ib.*

5. *Same.—Real Estate.—Possession.—Joint Tenant.*—A deed of land draws possession to the grantee, and the possession of one joint tenant is the possession of both. The title of neither is superior. *Ib.*
6. *Same.—Sheriff's Sale.*—Where a deed was made to C. and H., and the interest of C. was sold and conveyed by the sheriff, the purchaser did not thereby acquire a title superior to that of H., nor could C.'s title by lapse of time have become superior to that of his co-owner. *Ib.*
7. *Same.—Common Source of Titles.*—Where both parties claim under the same third person, it is *prima facie* sufficient to prove the derivation of title from him without proving his title. *Ib.*
8. *Same.—Measure of Damages.—Set-Off.—Mesne Profits.*—In actions for breach of the covenant of seizin, the measure of damages is the purchase-money with interest, without the right to set off the mesne profits. *Ib.*

DEFALCATION.

See PROMISSORY NOTE, 13.

DEFAULT.

See JUDGMENT, 1, 3; PRACTICE, 12.

1. *Effect.*—As a general rule, a default admits the facts stated in the complaint, but not allegations of quantity or value. *Stapp v. Davis, 128*
2. *Same.—Answer in Defence by one of two Defendants.*—Where one of two defendants answer a defence which will defeat the entire action, it will inure to the benefit of both, although one suffers a default. *Ib.*
3. *Same.—Separate Defence.*—Where the defences are distinct and separate, and the defence pleaded exonerates one defendant only, the plaintiff may have judgment against the defendant defaulted, although he fails as to the one who pleads. *Ib.*

DEFECTS CURED.

See INTERROGATORIES TO JURY; PRACTICE, 8; REPLEVIN, 4; VERDICT.

DELIVERY.

See CONTRACT, 7; EVIDENCE, 7; PROMISSORY NOTE, 21 to 24; SHERIFF'S DEED.

DEMAND.

See CONTRACT, 6; PROMISE; REPLEVIN, 8, 17.

DEMURRER.

See MORTGAGE, 14; PLEADING, 1 to 3, 7, 9, 10, 15, 19; PRACTICE, 2, 3, 7, 9; VERDICT.

Practice.—Exception.—An exception to the overruling of a demurrer must be taken at the time of the decision. It is not saved if, at a subsequent term, the party announces that he will abide by the demurrer, and excepts to the ruling made at the prior term.

American Ins. Co. v. Yearick, 208

DEMURRER TO EVIDENCE.

See REPLEVIN, 17.

DEPARTURE.

See PLEADING, 9; VENDOR AND PURCHASER, 6.

DEPOSITION.

See EVIDENCE, 2; PROMISSORY NOTE, 23; SUPREME COURT, 11; WITNESS, 3.

1. *Practice.—Motion to Suppress.*—A motion to suppress a deposition, for any objection appearing therein, must be made before entering on the

trial; and where such motion is made after the trial is commenced, for an objection appearing in the deposition, and is sustained by the court, it is an error for which, if properly saved and assigned, the judgment below will be reversed. *McGinnis v. Gabe*, 467

2. *Practice.—Suppressed Deposition.—Harmless Error.*—Where depositions have been suppressed, and the ruling is complained of as erroneous, the error, if any, will be considered harmless, when the record shows that the suppressed depositions were read in evidence, on the trial, by the complaining party. *Fell v. Muller*, 507

DESCENT.

See MARRIED WOMAN.

1. *Illegitimate Child.—Heir.—Statute Construed.*—Under the provisions of the act of February 10th, 1853, 1 R. S. 1876, p. 410, the brothers and sisters of an intestate take his estate, as heirs, to the exclusion of his illegitimate child. *Borroughs v. Adams*, 160
 2. *Second or Other Subsequent Wife.—Life-Estate.*—The proviso in section 24 of the statute of descents (section 2487, R. S. 1881) limits the right of a second or other subsequent wife in the lands of the husband, who has no children by her, but has children alive by a previous marriage, to an estate in fee for her life only in her share of such lands. *Armstrong v. Cavitt*, 476
 3. *Same.—Creditors of Husband.*—Such share of such second or other subsequent wife, in the lands of her husband, is held by her during her life, and, upon her death, descends to his children by a previous wife, free from all demands of his creditors. *Id.*
 4. *Same.—Power of Administrator.—Petition for Sale of Real Estate.—Orders of Court.—Jurisdiction.—Estoppel.*—In March, 1866, A. died intestate, the owner in fee simple of certain real estate, leaving S. A., his widow by a second marriage, and the plaintiffs, his children by his first wife, as his heirs at law. At the October term, 1866, of the court of common pleas, the administrator of A.'s estate filed his petition for an order to sell all of said real estate, for the payment of the decedent's debts, of which petition notice was duly given, in the mode prescribed by law. Upon the hearing, the widow, S. A., made default, and the plaintiffs, then infants, answered by their guardian *ad litem*; and the court then found that S. A. was the owner of a life-estate in one-third of said real estate, and ordered that the whole of said real estate be sold, subject to her said life-estate. On November 24th, 1866, S. A. consented that her interest in the real estate might be sold at the same time the decedent's interest therein was sold, under the order of the court, agreeing to take for her interest such allowance as the court might make her out of the proceeds of such sale. On February 23d, 1867, the administrator of A. sold the said real estate, in accordance with the order of the court and the consent of S. A., to one M., which sale was confirmed by the court, and a deed was ordered to said purchaser. At the next term of the court, the administrator of A. filed his petition, praying the court to declare the interest of S. A. in the proceeds of the sale of the real estate, together with her written agreement to accept a part of the money in lieu of her life-estate therein; and the court found the value of her life-estate in one-third of the proceeds to be a certain sum of money, which was fully paid by the administrator of A., under the order of the court, and accepted by S. A., in full satisfaction of her interest in the real estate. The widow, S. A., died in 1875, and from and under the said M., by regular conveyances, the defendants claimed title to all said real estate.
- Held*, that the foregoing facts constituted no defence whatever to the claim of the plaintiffs to the one-third of the real estate which, upon A.'s death, descended to S. A. in fee simple for her life only, and which

upon her death, descended in fee simple to the plaintiffs, free from all demands of the creditors of A.

Held, also, that the administrator of A. was not authorized by law to petition for, and the court of common pleas had no jurisdiction to order, the sale of such one-third, for the payment of A.'s debts.

Held, also, that the plaintiffs were not estopped, by any of the facts aforesaid, from asserting their claim and title to such one-third part of the real estate, when, upon the death of S. A., the same descended to them in fee simple. *Ib.*

DESCRIPTION.

See EJECTMENT, 1; LANDLORD AND TENANT, 2.

DILIGENCE.

See NEW TRIAL, 6.

DISEASED MEAT.

See CRIMINAL LAW, 1, 2.

DISMISSAL.

See SUPREME COURT, 6 to 8.

DUPLICITY.

See CRIMINAL LAW, 13.

DURESS.

Threats.—Mere angry or profane words, or strong and earnest language, will not constitute such duress as will relieve a party from his contract; for duress by threats, which will avoid a contract, only exists where such threats excite, or may reasonably excite, a fear of some grievous wrong, as bodily injury or unlawful imprisonment.

Adams v. Stringer, 175

EASEMENT.

See HIGHWAY, 1 to 5.

1. *Grant*.—*Prescription*.—*Deed*.—*Evidence*.—An easement is a way attached to an estate, belongs to the estate as part of it, and not to the person of the owner of the estate, and a grant of the estate passes the easement, though not specified in the deed, and even though the latter does not, in terms, convey appurtenances. Therefore, where title to the easement is claimed as having been acquired by prescription, proof that the present owner of the estate has personally enjoyed it for the requisite period of time is unnecessary. It is sufficient that it has been, during that period, attached to the estate of which he is now seized.

Ross v. Thompson, 90

2. *Same*.—*Highway*.—*Action for Damages*.—A private easement may exist in a way which is also a public highway, and it does exist whenever the lands are so situated, with reference to the highway, that the use of the latter is necessary for access to the land. In such case, the owner of the land can maintain a suit for damages for obstruction of the highway. *Ib.*

3. *Same*.—*Instruction*.—*Private and Public Way*.—*Obstruction*.—In such case, when the fact of obstruction by the defendant is not disputed on the trial, the complaint containing a paragraph for obstructing a private way, and another for obstructing a public way, necessary to approach the plaintiff's lands, an instruction to the jury is not available error, which declares that "The question for you to determine is, has the plaintiff the easement by prescription, claimed by him in the first paragraph of his complaint, or the special interest in the highway, claimed in the second paragraph of his complaint? If you find that he has either, your verdict should be in his favor." *Ib.*

EJECTMENT.

1. *Sheriff's Sale.—Deed.—Description.*—A defendant in an action of ejectment, who claims title through a sheriff's sale, can not maintain it unless the sheriff's deed describe the land in dispute.
Goss v. Meadors, 528
2. *Same.—Evidence.—Forcible Entry and Detainer.*—In such action it is not necessary for the plaintiff to prove a forcible entry and detainer. *Ib.*
3. *Same.—Power of Attorney.*—A power of attorney, executed by A. to B., authorizing the latter to lease, mortgage or sell the land of the former in order to pay his debts, does not authorize the latter to take and hold possession of the land in opposition to the former's wishes. *Ib.*

ELECTION.

See CITY, 19.

EMPLOYER AND EMPLOYEE.

See MASTER AND SERVANT; NEGLIGENCE, 1 to 3.

ESTOPPEL.

See DESCENT, 4; HIGHWAY, 3; PARTNERSHIP, 2, 5; PLEADING, 10.

Guardian and Ward.—Bond.—Sureties.—The sureties upon a guardian's bond, executed by them and their principal to obtain an order to sell real estate of his wards, after he has sold the real estate and received the money, are estopped to deny that their principal had in fact been appointed guardian of such wards. *Gray v. State, ex rel., 68*

EVICTION.

See DEED, 4; LANDLORD AND TENANT, 7.

EVIDENCE.

- See BENEVOLENT SOCIETY; BILL OF EXCEPTIONS, 2; CITY, 1, 2; CRIMINAL LAW, 3, 4, 14, 19; DEED, 4; EASEMENT; EJECTMENT, 2; FIXTURES, 1 to 3; INSTRUCTION, 1, 4, 9, 12, 13; INSURANCE, 2; JUDGMENT, 1, 2, 17; JUSTICE OF THE PEACE; LANDLORD AND TENANT, 4, 5; MORTGAGE, 1, 8; NEGLIGENCE, 5; NEW TRIAL, 3 to 7; PARTNERSHIP, 6, 10, 11, 12; PAYMENT; PRACTICE, 6; PROMISSORY NOTE, 5, 6, 16, 17, 24; REAL ESTATE, ACTION TO RECOVER; RECOGNIZANCE, 4; REPLEVIN, 8, 10, 13, 16; SUPREME COURT, 1 to 5, 9, 13, 16; VENDOR AND PURCHASER, 7; WITNESS.
1. *Experts.—Comparison of Handwriting.*—Evidence to prove the signature to papers, with a view to comparison by experts with the signature in dispute, is not admissible. The comparison by experts is confined to papers in the case which the party is estopped to deny, and such others as he admits to be genuine. *Hazard v. Vickery, 64*
 2. *Same.—Witness.—Deposition.*—Where a witness, testifying by deposition, states that he has seen the notes sued on, and has a copy of it, which he produces and makes a part of his deposition, his name appearing as attesting witness, he sufficiently identifies the note in suit, that he may say whether or not the alleged maker executed it, to his knowledge. *Ib.*
 3. *Same.—Transcript of Judgment of Supreme Court.*—In an action on an appeal bond, given on an appeal to the Supreme Court, a certified transcript of the judgment of that court is competent evidence. *Craig v. Ency, 141*
 4. *Record.—Copy.*—A record of another State, not judicial, may be proved by a sworn copy. *Hall v. Bishop, 370*
 5. *Same.—Tax List.—Fraudulent Conveyance.*—The original sworn list of property made for taxation is admissible against the party making it, and a certified copy is not necessary. Such list is not irrelevant in a

suit brought against him to set aside a conveyance on the ground that it was made to defraud his creditors, if it tends to show that he did not receive for the conveyance the consideration claimed. *Ib.*

6. *Same.*—*Officer.*—*Deputy.*—The official character of a person may be proved by parol. So also that he was the deputy of an officer. *Ib.*
7. *Mortgage.*—*Special Non Est Factum.*—*Delivery.*—*Practice.*—*Harmless Error.*—Upon trial of an issue formed upon an answer of *non est factum*, denying only the delivery of a mortgage sued on, it is harmless error to permit the plaintiff to introduce the mortgage in evidence and then make proof of its delivery. Delivery is a necessary part of the execution of a written instrument. *Kusler v. Orofoot, 597*
8. *Same.*—*Transcript.*—*Placita.*—*Foreign Judgment.*—It is not error to refuse to admit in evidence a transcript of a judgment rendered in another State, which contains no *placita* and does not show the date of the judgment, and does not profess to contain a complete copy of the proceedings in the case. *Ib.*

EXCEPTION.

See BILL OF EXCEPTIONS; DEMURRER; PRACTICE, 3.

EXECUTION.

See REAL ESTATE, ACTION TO RECOVER; REDEMPTION; RECOGNIZANCE, 2, 6; REPLEVIN, 17; SHERIFF'S SALE.

Sheriff's Return.—*Amendment.*—It is lawful for one who, as sheriff, executed process, to amend his return, by leave of the court, even after the expiration of his term of office. *Turner v. First Nat'l Bank, etc., 19*

EXECUTOR.

See DECEDENTS' ESTATES, 5.

EXECUTORY CONTRACT.

See CONTRACT, 7.

EXHIBITS.

See PLEADING, 11, 21.

EXPERTS.

See EVIDENCE, 1, 2.

EXTENSION OF TIME.

See PROMISSORY NOTE, 6, 10.

FACTOR.

1. *Lien.*—One who carries on the business of slaughtering hogs, and curing, storing and selling the product, as well for himself as for others, and makes advances to such customers, continuously holding possession of their product until he sells it, is a factor, and has a lien on the product of the customer, for services and advances. *Shaw v. Ferguson, 547*

2. *Same.*—*Measure of Damages.*—Where a factor sells the property of his principal, on which he has a lien for services and advances, he may retain the amount of his lien out of the proceeds, whether the sale be authorized or tortious, and he is liable (no question being made about the price obtained) only for the balance. *Ib.*

FEE SIMPLE.

See DEED, 3.

FENCE.

See RAILROAD.

FINDING.

See MORTGAGE, 7; PRACTICE, 1, 11; SPECIAL FINDING.

FIXTURES.

1. *Replevin.—Evidence.—Stave Machine.—Grist Mill.—Line Shaft.*—In an action of replevin for possession of a stave machine, consisting in part of a line shaft connecting it with a grist mill, evidence tending to show that the machine was set up under an adjoining shed, so that by means of belting it could be run by the steam engine in the mill; that the line shaft was hung from joists in the mill, and that the rest of the machine was not attached to the real estate, justified a finding that the line shaft was personal property. *Balliett v. Humphreys, 388*
 2. *Same.—Circuit Court.—Justice of the Peace.—Title to Real Estate.—Jurisdiction.*—In such case, objection under section 11, 2 R. S. 1876, p. 607, that the justice of the peace had not jurisdiction of the action, because the title to lands came in question, ceased to be an objection when the cause reached the circuit court, on appeal. *Ib.*
 3. *Same.—Pleading.—Practice.*—In such case, in the circuit court, under section 34, 2 R. S. 1876, p. 612, the defendant, without plea, was entitled to show that the articles sued for as personal property were fixtures. *Ib.*
 4. *Same.—Instruction.*—In such case, the trial court correctly refused to instruct that if the shaft was bolted on and fastened securely to the joists of the mill, it was a part of the real estate on which the mill was situate. *Ib.*
 5. *Mortgage.—A., in possession, but not the owner, of a flouring mill, was permitted by the manufacturers of machinery to put into and annex to it, in such a temporary manner as to admit of removal without injury to the mill, certain machinery which, if found satisfactory, after sixty days' trial, was to become his property upon giving his notes for the price and notice of his acceptance of the machinery. The mill and real estate were, at the time, subject to two mortgages. A. refused to accept the machinery or give his notes as he had agreed, and when he quit possession the machinery remained in the mill, a tenant taking possession.*
- Held, that, as between the manufacturers and the mortgagees, the machinery was part of the real estate, and subject to the mortgages.*
Hamilton v. Hunley, 521

FORCIBLE ENTRY AND DETAINER.

See EJECTMENT, 2.

FORECLOSURE.

See JUDGMENT, 11; MARRIED WOMAN, 2; MORTGAGE; PLEADING, 5.

FOREIGN JUDGMENT.

See EVIDENCE, 8.

FORGERY.

See PROMISSORY NOTE, 6.

FORMER ADJUDICATION.

See MASTER AND SERVANT, 2.

FORMER CONVICTION.

See CRIMINAL LAW, 3.

FRAUD.

See CONTRACT, 1, 2; INSTRUCTION, 4; INSURANCE, 1; PROMISSORY NOTE, 11 to 14, 16 to 19; VENDOR AND PURCHASER, 1, 2.

Allegations and Proof.—The facts necessary to establish fraud must be alleged and proved by the party who relies upon it.

Howe, etc., Co. v. Brown, 209

FRAUDULENT CONVEYANCE.

See EVIDENCE, 5.

GATEWAY.

See HIGHWAY, 6, 7,

GENERAL DENIAL.

See PROMISSORY NOTE, 2.

GIFT.

See PROMISSORY NOTE, 21.

GRAIN BROKER.

See PROMISSORY NOTE, 25.

GRANT.

See CITY, 13, 15; EASEMENT.

GRAVEL ROAD.

See CONSTITUTIONAL LAW, 2.

GUARDIAN AD LITEM.

See SUPREME COURT, 10.

GUARDIAN AND WARD.

See ESTOPPEL; TAXES.

HABEAS CORPUS.

See RECOGNIZANCE, 4.

HANDWRITING.

See EVIDENCE, 1, 2.

HARMLESS ERROR.

See BASTARDY; DEPOSITION, 2; EVIDENCE, 7; INSTRUCTION, 7; PLEADING, 2; PRACTICE, 2, 13; REAL ESTATE, ACTION TO RECOVER, 1, 3; RECOGNIZANCE, 6; SUPREME COURT, 4, 14, 16.

HEARSAY.

See PROMISSORY NOTE, 24.

HEIR.

See DECEDENTS' ESTATES, 2, 3; DEED, 1; DESCENT; JUDGMENT, 3; MECHANIC'S LIEN; MORTGAGE, 9 to 12; WILL.

HIGHWAY.

See CRIMINAL LAW, 14; EASEMENT; PRIVATE WAY.

1. *Prescription.—Dedication.—User.*—User for twenty years constitutes a road a public highway, but user for a less period may so constitute it by dedication, all that is required being the assent of the owner of the soil to the public use, and the enjoyment of such use for such a period that public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment. *Ross v. Thompson*, 90 *Ib.*
2. *Same.—Acceptance.*—An acceptance by the public of such way is shown by long continued user, grading, macadamizing, bridging, or the like. *Ib.*
3. *Same.—Estoppel.*—Where the owner of land through which a way runs knows that another is making costly improvements, in the faith that the way is public, and offers no objection, he is estopped from asserting that the way is not public. *Ib.*
4. *Same.—Damages.—Injunction.*—One whose only mode of access to his real estate is being interrupted by unlawful obstructions, may arrest

- the injury by injunction, and he may recover damages merely nominal, not being bound to wait until the injury is fully consummated and actual damages have accrued. *Ib.*
5. *Same.—Dedication.—Intention.—Presumption.*—Intention by the owner of the soil to dedicate a way to public use must appear by proof, but it will be presumed against the owner of the soil, when the easement has been enjoyed by the public during a period corresponding with the limitation of real actions, fixed by statute. *Ib.*
 6. *Gateway.—Act of 1852.—Board of Commissioners.*—A highway laid out by the board of commissioners of a county in 1835, and used by the public and worked and controlled by the road supervisor, could not be changed into a gateway by order of the board of commissioners in 1859, such authority being vested exclusively in the township trustees by the act of June 17th, 1852, 1 R. S. 1852, p. 307. *Webb v. Carr, 455*
 7. *Same.—Act of 1859.—Saving Clause.—Statute Construed.*—In such case the petition presented to the commissioners at the June term, 1859, and granted, was not saved by the saving clause of the act of March 5th, 1859, Acts 1859, p. 113, in force August 6th, 1859, so as to authorize an order of the board at the September term, 1859. *Ib.*

HUSBAND AND WIFE.

See JUDGMENT, 12; MARRIED WOMAN; PARTNERSHIP, 13, 14; REPLEVIN, 5; VOLUNTARY ASSIGNMENT, 1.

INDICTMENT.

See CRIMINAL LAW, 2, 7, 8, 19.

INFANT.

See SUPREME COURT, 10.

INFORMATION.

See LIQUOR LAW, 6.

INJUNCTION.

See CITY, 9 to 11; HIGHWAY, 4; PLEADING, 9; TRADE MARK.

1. *Remedy at Law.*—Where there is an adequate legal remedy, an injunction will not be granted. *Cuskey v. City of Greensburgh, 253*
2. *Referee.—Appeal.*—Injunction is not the proper remedy to prevent a referee appointed to take evidence from proceeding to the discharge of his duties. An appeal is necessary. *Shoemaker v. Axtell, 561*
3. *Same.—Legal Remedy.—Equitable Relief.*—Where a party's legal remedy is perfect and complete, equitable relief will not be granted. The principle remains as it was when actions at law and suits in equity were distinct. *Ib.*
4. *Supreme Court.—Jurisdiction.*—The Supreme Court, by virtue of section 1147, R. S. 1881, has jurisdiction to issue an injunction forbidding the enforcement of a judgment below, pending an appeal therefrom, when necessary to maintain the *statu quo*. *Leech v. State, ex rel., 570*

INSOLVENCY.

See MORTGAGE, 9, 11.

INSTRUCTION.

- See BASTARDY; CRIMINAL LAW, 14; EASEMENT, 3; FIXTURES, 4; LANDLORD AND TENANT, 7; PARTNERSHIP, 22; PRIVATE WAY, 2; RECOGNIZANCE, 5, 6; SUPREME COURT, 4; VENDOR AND PURCHASER, 4.
1. *Practice.—Evidence.*—It is the duty of the court, by instructions, to construe record and other written evidence in the cause, and to state its effect. *Turner v. First Nat'l Bank, etc., 19*

2. *Practice*.—There is no error in an instruction to the jury which, announcing no legal proposition, merely states the nature of the plaintiff's claim. *Ross v. Thompson, 30*
3. *Same*.—*Practice*.—In order to save any question in reference to instructions, under sections 324-5 of the Code, it must appear that the same were filed. *Supreme Lodge, etc., v. Johnson, 110*
4. *Same*.—*Fraudulent Representations*.—*Evidence*.—Where a representation charged to be false and fraudulent was, that the plaintiff was indebted to the defendant in a certain sum, and there was evidence tending to prove that the plaintiff was in fact so indebted, the court properly instructed the jury, that, if they believed such facts to exist, their finding must be for the defendant, upon the question of fraud. *Adams v. Stringer, 175*
5. *Same*.—*Motion for New Trial*.—*Practice*.—The instructions asked for, and refused by the court, can not be made a part of the record of a cause by merely copying them in the motion for a new trial. *Id.*
6. *Same*.—*Supreme Court*.—*Practice*.—Where an instruction is given, which states the law correctly, as far as it goes, and the only objection to it is, that it does not contain a full statement of the law applicable to the case, the objecting party can not make such objection available in the Supreme Court, by excepting to the instruction given; but, in such case, he must ask the trial court for an additional instruction, to supply the supposed omissions in the one given, and, if such additional instruction is refused, he must see that it, as well as the one given, is made part of the record in one of the modes prescribed by law. *Id.*
7. *Disregard of Issue*.—*Harmless Error*.—Where an instruction of the court is confined to an affirmative defence, in disregard of the general denial pleaded, the error will be deemed harmless, there being no conflict in the evidence, or dispute in the case, except in reference to the affirmative issue. *Browning v. Hight, 257*
8. *Same*.—*Jury*.—*Presumption*.—It is not to be presumed, on appeal, that the jury misunderstood the meaning of an instruction. *Id.*
9. *Evidence*.—*Issues*.—*Practice*.—*Supreme Court*.—An instruction, which is not applicable to any evidence admissible under the issues, is erroneous, and will reverse the case, although the evidence is not in the record. *Cates v. Bales, 285*
10. *Reference to Complaint in General Terms*.—*Practice*.—In an instruction submitting an issue arising upon the sale and payment for eleven mules, a reference to the mules as a "lot of mules," without indicating the number designated in the complaint, was not too general. The complaint containing the precise number was already before the jury, to aid the reference to it with exactness. *Anderson v. Donnell, 303*
11. *Practice*.—The error of an incorrect instruction to the jury is not cured by giving another which states the law correctly, unless the erroneous instruction be expressly withdrawn. *Uhl v. Bingham, 365*
12. *Practice*.—It is not error to refuse to give an instruction which is not applicable to the case made by the evidence. *Leary v. Meier, 393*
13. *Same*.—*Proof of Averments in Different Paragraphs of Complaint*.—*Burden of Proof*.—Where the complaint consists of more than one paragraph, it is proper for the court to instruct the jury that the burden is upon the plaintiff, and, to entitle him to recover, he must prove by a fair preponderance of the evidence all the material averments in some one of the paragraphs of the complaint. Such an instruction does not inform the jury that proof of one paragraph entitles him to recover on all of them. *Id.*

14. *Same*.—A party desiring further instructions upon a question of law must ask for them. *Hutton v. Jones*, 466

INSURANCE.

See CONTRACT, 2, 3; VENDOR AND PURCHASER, 3, 4.

1. *Promissory Note.—Fraud.—Pleading.*—In an action by an insurance company upon a promissory note, given for premiums on insurance, an answer is good which avers false representations of existing facts affecting the responsibility of the company and its ability to fulfil its contracts, made by its agent as to matters presumed to be within his knowledge, and of which the defendant was ignorant, whereby the defendant was injured. *American Ins. Co., etc., v. Pressell*, 442
2. *Same.—Foreign Insurance Company.—Evidence.*—A foreign insurance company furnished to the Auditor of State a statement substantially as required by statute. The copy of its charter was furnished as a separate paper, and not embraced as the fourteenth item of the statement, as section 3765, R. S. 1881, specifies. This was accepted by the auditor as sufficient. The auditor's certificate of authority and copy of statement recited that a copy of the charter was filed, and this was filed by the company's agent in the clerk's office, without a copy of the charter.

Held, that a premium note taken for insurance made in the county was not, for this cause, void. *Ib.*

INTENTION.

See CITY, 16; HIGHWAY, 5.

INTERROGATORIES TO JURY.

Special Interrogatories.—Practice.—Defects Cured.—Special interrogatories in reference to particular facts within the issues, may be submitted to the jury, but not questions covering entire issues. It is not error to refuse an immaterial interrogatory. Errors may be cured by the answers to interrogatories. *Uhl v. Harvey*, 26

ISSUE.

See INSTRUCTION, 8 to 10; JUDGMENT, 1; PLEADING, 16.

JOINDER OF CAUSES.

See PRIVATE WAY.

JOINT TENANT.

See DEED, 5.

JUDGMENT.

See ACCORD AND SATISFACTION; ATTORNEY; CONTRACT, 6; COSTS; CRIMINAL LAW, 11; DECEDENTS' ESTATES, 3; DEED, 4; EVIDENCE, 3, 8; JUSTICE OF THE PEACE; MECHANIC'S LIEN; MORTGAGE, 7, 8, 14; PARTNERSHIP, 14; PLEADING, 9; PRACTICE, 11, 13; REAL ESTATE, ACTION TO RECOVER; SHERIFF'S SALE, 1; TOWNSHIP TRUSTEE, 2.

1. *Default.—Action for Relief under Section 99.—Practice.—Issues.—Proof.*—An applicant, under section 99 of the code, for relief from a judgment by default, need not prove his alleged defence to the original action, but he must prove his excuse for suffering the default, and the proof *pro* and *con* may be by affidavit, including the applicant's verified complaint or motion, or by oral testimony, or by both kinds of evidence, in the discretion of the court. *Morris v. Buckeye, etc., Co.*, 86
2. *Same.—Evidence.—Record.—Supreme Court.*—The exclusion of evidence on a particular point, or of a particular kind, presents no question when the record does not show what other evidence was offered or admitted. *Ib.*
3. *Same.—Decedents' Estates.—Personalty belongs to Representative, not to Widow and Heirs.—Parties.—Default.*—In an action, under section 99

of the code, to be relieved from a judgment on default, the complaint alleged that after the death of the judgment plaintiff, who had obtained a judgment upon a contract, whereby M and another had agreed to release the judgment plaintiff from a debt owing by him to B., B. procured an order against the widow and heirs, the administrator not being made a party, substituting B. as plaintiff in the judgment, and hence B. is made defendant to the application to set the judgment aside.

Held, that the order substituting B. as plaintiff was a nullity.

Held, also, that the judgment belonged to the administrator, not to the widow, and that B. was consequently not a necessary party to the plaintiff's application, and the administrator having made default, the plaintiff was entitled as against him to an order setting the default aside. *Ib.*

4. *Relief.—Supreme Court.—Practice.*—When the plaintiff is entitled to a judgment, but the judgment rendered gives relief to which he is not entitled, but no objection to the form thereof was made below, there is no remedy in the Supreme Court. *Baddeley v. Patterson, 157*
5. *Practice.—Record.—Omission.—Limitation.*—A proceeding to correct the record of a judgment rendered December 11th, 1877, by a motion to supply an omission, filed January 14th, 1880, under section 99, 2 R. S. 1876, p. 82, came too late, and should have been dismissed because not commenced within two years. *Douglass v. Keech, 199*
6. *Same.—Pleading.*—In such a proceeding no formal pleading beyond the complaint, or motion, is necessary, and the application should be heard and decided in a summary manner. *Ib.*
7. *Same.—Practice.*—Objection to the proceeding may be made by a motion to quash, or to dismiss, for reasons apparent upon the face of the pleading and accompanying affidavits. *Ib.*
8. *Action to Set Aside.—Practice.—Complaint.*—A complaint to set aside a judgment taken against a party through his surprise, inadvertence or excusable neglect, need not be verified. *Neucome v. Wiggins, 306*
9. *Same.—Parties.—Waiver.*—If all persons who were parties to the former proceedings should not be parties to such application to set aside the judgment, a failure to demur for such reason is a waiver of the objection. *Ib.*
10. *Same.—Pleading.—Complaint.*—A complaint, in such application, under section 99 of the code, 2 R. S. 1876, p. 82, showing that the judgment was taken through a party's excusable negligence, and that he has a meritorious defence, is sufficient. *Ib.*
11. *Decree of Foreclosure.—Collateral Attack.—Action to Recover Real Estate.—Sheriff's Sale.—Presumption.*—A decree of foreclosure against a woman and her husband can not be successfully attacked by her as a defendant in a collateral proceeding by the holder of the sheriff's deed to recover possession of the real estate sold and conveyed to him by virtue of the decree. The correctness of the decree, and of the sheriff's sale under it, must be presumed against her. *Dill v. Vincent, 321*
12. *Same.—Wife's One-Third of Proceeds.*—In such case, if the wife be entitled to one-third of the proceeds arising from the sale of the mortgaged premises, she must enforce her right by separate action. It would not defeat the purchaser's right to possession. *Ib.*
13. *Privies.*—A judgment binds only parties and privies. *Wilson v. Peelle, 384*
14. *Jurisdiction.*—A judgment rendered in a case where the court has no jurisdiction of the subject-matter is of no validity whatever. *Webb v. Carr, 455*
15. *Practice.—Relief from Judgment.—Excusable Neglect.—Complaint.*—A

complaint for relief from a judgment, under section 396, R. S. 1881, which shows that the party had a good defence capable of proof, and that because of sickness of a member of the family, and the change, without his knowledge, of the hour of convening court, he did not reach court with his witnesses until the cause had been tried, is good on demurrer. *Flanagan v. Patterson, 514*

16. *Same.—Statute Construed.*—The relief provided by section 396, R. S. 1881, is not confined to judgments by default. *Nelson v. Johnson, 18 Ib.*

17. *Clerical Error or Mistake.—Evidence.*—Upon motion or petition, and notice, the court has power to correct clerical errors or mistakes in the entry or record of its judgments, and, to that end, parol evidence is admissible. *Mitchell v. Lincoln, 531*

JUDGE OF CIRCUIT COURT.

See BILL OF EXCEPTIONS, 3.

JUDICIAL NOTICE.

See CRIMINAL LAW, 9.

JUDICIAL SALE.

See VOLUNTARY ASSIGNMENT, 1.

JURISDICTION.

See CRIMINAL LAW, 5, 6, 17, 18; DESCENT, 4; FIXTURES, 2; INJUNCTION, 4; JUDGMENT, 14; REPLEVIN, 6, 11; VOLUNTARY ASSIGNMENT, 2.

JURY.

See CITY, 1; INSTRUCTION, 8; INTERROGATORIES TO JURY; NEW TRIAL, 5; PARTNERSHIP, 22; PLEADING, 17.

JUSTICE OF THE PEACE.

See COSTS; CRIMINAL LAW, 5, 6; FIXTURES, 2, 3; REPLEVIN, 6, 11.

1. *Entry of Judgment.—Copy of Cause of Action.*—Under section 18 of the act of June 9th, 1852, defining the jurisdiction, powers and duties of justices of the peace in civil cases (section 1437, R. S. 1881), it is the duty of a justice to enter of record, in his docket, among other things, "a copy of the cause of action;" but his omission or failure to so copy the cause of action will not vitiate or avoid the judgment rendered thereon. *Reed v. Whitton, 579*
2. *Same.—Summons and its Service.*—It is not necessary that the justice should copy the summons in the record of his judgment; a copy of the constable's return or a memorandum, showing service of the summons on the defendant, will be sufficient. *Ib.*
3. *Same.—Judgment, Conclusive Evidence.—Collateral Attack.*—The judgment of a justice of the peace is conclusive evidence of the facts set forth therein; and it can not be attacked collaterally, or contradicted or impeached either by evidence or in pleading. *Ib.*
4. *Same.—Evidence.*—The record of a justice's judgment and the pleadings and meane or final process in the cause, when produced and properly identified, are competent evidence. *Ib.*

LANDLORD AND TENANT.

See REPLEVIN, 12 to 15.

1. A tenant can not dispute his landlord's title. *Epstein v. Greer, 348*
2. *Same.—Notice to Quit.—Description.*—The description of the premises in a notice to quit, as "the dwelling-house situate on the northeast corner of Fifth and Judiciary streets, Aurora, Indiana, now held of me by you as tenant," is sufficient. *Ib.*

3. *Same*.—*Service of Notice*.—*Statute Construed*.—Service of the notice may be made and proved by a constable, and such notice may be served under section 6, 2 R. S. 1876, p. 341, on the tenant, whether on or off the premises, or, if he can not be found, upon some one of proper age residing on the premises. *Id.*
4. *Lease*.—*Evidence*.—*Real Estate, Action to Recover*.—In an action to recover real property, brought by a landlord against his tenant before a justice, a lease which purports to have been executed by the latter, and is referred to in the complaint, may be read in evidence without proof of its execution. *Leary v. Meier, 393*
5. *Same*.—*Parol Evidence*.—Where a lease fixes the commencement and duration of a term, parol evidence offered to show the time of its termination is properly refused. *Id.*
6. *Same*.—*Tenancy from Year to Year*.—*Notice*.—*Rent*.—A tenancy from year to year may be terminated by ten days' notice to quit for a failure to pay rent, unless such rent is paid at the expiration of such time. *Id.*
7. *Same*.—*Eviction*.—*Suspension of Rent*.—*Instruction*.—It is not error to refuse to instruct the jury that an eviction of the tenant by the landlord suspends rent when it appears from the evidence that rent had accrued and remained unpaid before the alleged eviction. *Id.*

LARCENY.

See CRIMINAL LAW, 8.

LEASE.

See LANDLORD AND TENANT, 4, 5; PLEADING, 9.

LEGISLATURE.

See CITY, 13, 15, 16.

LEVY.

See SHERIFF'S SALE, 1.

LICENSE.

See LIQUOR LAW; TRADE MARK, 3.

LIEN.

See DECEDENTS' ESTATES, 3; FACTOR; MECHANIC'S LIEN; PLEADING, 9; SHERIFF'S SALE.

LIFE-ESTATE.

See DESCENT, 2 to 4.

LIFE INSURANCE.

See BENEVOLENT SOCIETY.

LIQUOR LAW.

See WILL.

1. *Intoxicating Liquors*.—*Constitutional Law*.—*License to Sell*.—*Bond*.—So much of section 4 of the act of March 17th, 1875, regulating and licensing the sale of intoxicating liquors (1 R. S. 1876, p. 870), as requires the applicant for such license to give bond to the State of Indiana, conditioned, among other things, that he will pay all fines and costs that may be assessed against him for any violations of the provisions of said act, is matter properly connected with the subject of the act, and is, therefore, a constitutional and valid provision.

Kane v. State, ex rel., 103

2. *Same*.—*Licensee's Bond*.—*Fines and Costs*.—*Rights of Replevin Bail*.—*Subrogation*.—Where fines and costs have been assessed against one li-

censed to sell intoxicating liquors, for violations of the provisions of said act, and his replevin bail has been compelled to pay and has paid such fines and costs, such replevin bail may be subrogated to the rights of the State in such licensee's bond, and may recover thereon from the licensee and his sureties in such bond the amount so paid by such replevin bail, with interest and costs. *Ib.*

3. *License.—Date.—Relation Back.*—A license to sell intoxicating liquor, under the law of March 17th, 1875, should bear date of the day when issued, takes effect from that date, and does not relate back to the order of the board of commissioners granting the license, though so dated, so as to legalize sales made between the date of the order and the issuing of the license. *Vannoy v. The State*, 64 Ind. 447, and *The State v. Wilcox*, 66 Ind. 557, overruled. *Keiser v. The State*, 430
4. *Same.—Bond.*—The license can not lawfully issue until the licensee has given the bond required by law, and such bond does not cover transactions which occurred before its execution. *Ib.*
5. *Same.—Statutes.—Repeal.*—The 12th section of the liquor law of 1875 is not repealed by section 249 of the act of 1881 concerning public offences.
6. *Same.—Criminal Law.—Information and Affidavit.—Name of Accused.—Practice.—Amendment.*—An affidavit and information, in a prosecution for selling intoxicating liquor without license, must name or in some way designate the accused, and, if the information omits the name, it should, on motion, be quashed. In the lower court the information might have been amended to conform to the affidavit, but, over a motion to quash, it will not be regarded as amended on appeal. *Ib.*

LOAN.

See CITY, 7, 8; MORTGAGE, 3 to 5; PRINCIPAL AND AGENT.

MANDAMUS.

See TOWN, 2.

MARGINS.

See PROMISSORY NOTE, 25.

MARRIED WOMAN.

1. *Alienation of Real Estate.*—A woman can not, during the existence of a second or subsequent marriage, alienate real estate acquired and held by her in virtue of a previous marriage. *Connecticut, etc., Ins. Co. v. Athon*, 10
2. *Same.—Effect of Conveyance.—Practice.—Action to Quiet Title.—Foreclosure.—Descent.*—A., a married woman, held in virtue of her former marriage the undivided one-third part of a lot in the city of Indianapolis; during her second marriage, A. and her then husband sold and conveyed, by a warranty deed, the interest so held by her in said lot to one L., and received from him the purchase-money therefor; L. entered upon and took possession of such interest in said lot, under said warranty deed, and had not and did not claim any other or different title thereto; L. and his wife executed a mortgage covering such interest in said lot, without the knowledge or consent of A., and without notice thereof to her until long after its execution. Action to foreclose the mortgage.
Held, that, in so far as the interest held by A. in said lot in virtue of her previous marriage was concerned, the warranty deed of A. and her then husband did not, and could not, under the provisions of section 18 of the statute of descents, operate as a conveyance of such interest to L., but, for that purpose, was inoperative and void.
Held, also, that A., as a defendant in such suit, had a clear and legal right

to ask, by counter-claim or cross-complaint, that the question of her title to the interest so held by her in said lot might be determined and quieted. *Ib.*

MASTER AND SERVANT.

See NEGLIGENCE.

1. *Contract.—Rescission.—Damages.*—Where a servant, hired for a definite period, is wrongfully discharged before the time expires, he may treat the contract as continuing on his part, and recover damages for its breach by the discharge, or he may rescind and recover only for wages actually earned. *Richardson v. Eagle Machine Works, 422*
2. *Same.—Former Adjudication.*—Where, in such case, the servant treats the contract as continuing, and by suit recovers an amount equal to the stipulated wages until the commencement of the suit, the judgment bars a subsequent suit for damages for breach of the contract, or for further wages. *Ib.*

MEASURE OF DAMAGES.

See CONTRACT, 7; DEED, 8; FACTOR, 2.

MECHANIC'S LIEN.

See PLEADING, 9; PRACTICE, 11.

1. *Judgment.—Decedents' Estates.—Heir.*—A mechanic's lien upon lands of the ancestor may be enforced against the lands in the hands of his heir, but a personal judgment against the heir can not be obtained. *McGrew v. McCarty, 496*
2. *Same.—Notice.*—A joint notice of mechanic's lien by two or more persons having separate claims against distinct parcels of property is bad; so also is a single notice by one against separate parcels, seeking to charge both parcels with the aggregate of his claims against each. *Ib.*
3. *Notice.*—One who furnishes material for a part only of a building must file his notice of intention to hold a lien within sixty days from furnishing the materials and bring his action within a year from the same time unless credit is given. *Cuppy v. O'Shaughnessy, 245*

MERGER.

See PROMISSORY NOTE, 8.

MESNE PROFITS.

See DEED, 8; UNLAWFUL DETENTION OF LAND.

MISREPRESENTATION.

See CONTRACT, 1, 2; INSTRUCTION, 4; INSURANCE, 1; PROMISSORY NOTE, 11 to 14.

MISTAKE.

See JUDGMENT, 17.

1. *Mistake of Fact.—Reformation of Deed or Mortgage.*—Where it appears that, by the mutual mistake of all the parties to a deed or mortgage as to matters of fact, the instrument does not conform to or express their intention and agreement, a court of equity will reform the instrument by correcting such mistake. *Easter v. Severin, 540*
2. *Mistake of Law.*—Where it is sought to reform an instrument on the ground of mistake, and it does not appear that the instrument does not contain the precise language the parties intended it should contain, the mistake, if any, is a mistake of law as to the legal effect of such language; and for mistakes of law, except under peculiar circumstances not shown to exist in this case, a court will afford no relief. *Ib.*

MORTGAGE.

See EVIDENCE, 7; FIXTURES, 5; JUDGMENT, 11, 12; MISTAKE; PLEADING, 5, 6; PROMISSORY NOTE, 1.

1. *Note Given in Lieu of Notes Secured by Mortgage.—Evidence.—Payment.*—In an action upon a note, and to foreclose a mortgage given to secure the notes for which the note in suit had been executed, evidence that the plaintiff's assignor received the note in full payment of the mortgage notes is admissible, and if the mortgage notes were fully paid by the new note there could be no foreclosure of the mortgage.

Weston v. Wiley, 54

2. *Vendor and Purchaser.—Consideration.—Attachment.—Garnishee.—Notice.—Assignment.—Reply.*—To a complaint by the assignee of a mortgage against E., the mortgagee, and F., a subsequent purchaser, of the premises, F. answered that, as a part of the consideration for his purchase of the land from E., he agreed to pay the mortgage debt, and was ready and willing to pay at maturity, but that he had been summoned as garnishee in an attachment suit against E., wherein judgment was obtained in favor of the attaching creditor, and thereupon, without notice of the assignment of the mortgage debt, he paid the amount thereof into court as such garnishee. Reply: 1st. That the plaintiff became assignee of the mortgage debt, without notice of the proceedings mentioned in the answer. 2d. That F. had notice of the assignment, but not alleging that such notice was before the payment by him. 3. That F., having failed in an effort to purchase the mortgage debt from the payee, for the fraudulent purpose of depriving the plaintiff of his debt, caused said attachment and garnishment proceedings to be begun, having good reason to believe that the plaintiff had purchased the debt and mortgage; that the plaintiff purchased for a valuable consideration, without knowledge of said garnishment proceedings, and that F. had notice of the plaintiff's purchase in time to have availed himself of the fact as a defence as garnishee, but fraudulently failed to do so.

Held, that the paragraphs of reply were bad, except the third, which was good, inasmuch as it, in effect, alleged notice of the assignment before judgment in the garnishment proceedings. *Daggett v. Flanagan, 253*

3. *Contract.—Construction.—Corporation.*—A mortgage executed by G., describing himself as president of a turnpike corporation, mortgaging the road of the corporation, and containing a covenant to pay the sum secured, which was, in fact, given to secure a loan to the corporation, and was given and accepted as the instrument of the corporation, will, *it seems*, be so held, and not the instrument of the person whose name it bears. *Johnson v. Gibson, 232*

4. *Same.*—After the mortgagee had, in a suit against the corporation, obtained against it a foreclosure and personal judgment for the debt, he will be bound by the construction which he has thus placed upon the instrument. *Ib.*

5. *Same.—Pleading.—Corporation.*—An answer in such case, which shows the use of a name importing a corporation, the exercise of corporate franchises, a dealing with it by the plaintiff as such, that he was an officer of it, and obtained a judgment against it, sufficiently shows the existence of the corporation, without a direct averment that it was a corporation. *Ib.*

6. *No Priority between Different Claims.*—A single mortgage, given to secure obligations to different parties maturing at different times, is equivalent to the simultaneous giving of separate mortgages to secure such obligations, and no priority is allowed. Otherwise, if the obligations were payable to the same party and had passed into the hands of different owners.

Shaw v. Newsom, 535

7. *Same.—Special Finding.—Motion to Modify Decree.—Practice.*—When a motion is made to modify a decree of foreclosure rendered upon facts found specially, the court for the purposes of the motion, can not look beyond the finding and the pleadings. *Id.*
 8. *Same.—Evidence.*—Evidence admitted, but not relevant to any issue, furnishes no ground either for modifying the judgment or decree, or for a new trial. *Id.*
 9. *Foreclosure.—Decedents' Estates.—Heirs.—Consideration.—Pre-existing Debt.—Insolvency.*—In an action against the heirs and administrator of a deceased mortgagor, to foreclose mortgages, answers that the mortgages were given to secure pre-existing debts, there being no new consideration therefor, and that the decedent's estate was insolvent, contain no defence. *Evans v. Pence, 489*
 10. *Same.—Privity.*—An existing indebtedness is a sufficient consideration to support a mortgage as between mortgagor and mortgagee. If obligatory upon the mortgagor in his lifetime, the mortgage is valid against those in privity with him by representation. *Id.*
 11. *Same.—Insolvency of Estate.—Preferred Debts.—Statute Construed.*—Mortgages of a decedent were not invalidated by the insolvency of his estate; but under sections 108 and 109, 2 R. S. 1876, p. 534, were preferred debts as to the personality. *Id.*
 12. *Same.—Recording.*—That a mortgage was not recorded within the time prescribed by statute, is not a defence that can be made by the administrator and heirs of the deceased mortgagor. *Id.*
 13. *Contract of Assumption.—Right of Action.*—One who agrees with a mortgagor to assume and pay the mortgage debt may be sued upon his agreement either by the holder of the debt or by the mortgagor. *Jones v. Parks, 537*
 14. *Same.—Pleading.—Practice.—Cross Complaint.—Personal Judgment.*—In an action of foreclosure and to obtain a personal judgment against a mortgagor and his grantee who had assumed the mortgage debt, the mortgagor filed a cross complaint alleging the promise of his grantee, and asking that the execution over be levied first upon his property. To the complaint the grantee answered, denying personal liability, because of an alleged rescission of his contract of assumption, before notice of acceptance by the plaintiff, and to the cross complaint filed a demurrer, which the court overruled, and, sustaining the plaintiff's demurrer to the answer, gave judgment as prayed.
- Held*, that the cross complaint, to which, after the overruling of his demurrer, the defendant refused to plead, warranted the rendering of a personal judgment against him, and it was immaterial whether the ruling on the demurrer to his answer was right. *Id.*

NAME.

See LIQUOR LAW, 6; MORTGAGE, 5.

NATIONAL BANK.

See BANK.

NEGLIGENCE.

See ATTORNEY; CRIMINAL LAW, 7; PARTNERSHIP, 3; PROMISSORY NOTE, 17, 18.

1. *Railroad.—Negligence of Co-employee.—Brakeman.—Train Dispatcher.*—Injury to a brakeman upon a train *en route*, by reason of a collision with another train moving in an opposite direction, and which was the result of the negligence of the train dispatcher, whose duty it is to control the movement of trains, affords no right of action against the railroad company for the injury. The brakeman and train dispatcher,

though many miles apart, and with distinct duties, are nevertheless co-servants in the accomplishment of the same general object.

Robertson v. Terre Haute, etc., R. R. Co., 77

2. *Railroad.—Passenger Trains.—Rights of Passengers.—Contributory Negligence.*—A passenger on a passenger train, unacquainted with the route of the railroad, and with the location of towns and cities along such route, may lawfully rely upon the statements of the conductor and brakemen in charge of the train, in regard to his stopping-place; and if, so relying, such passenger leaves the train at the wrong place, and is damaged thereby, the railroad company will be liable to such passenger for such damages, induced by the negligence of its agents, in charge of the train, if there be no contributory negligence of such passenger.
Pennsylvania Co. v. Hoagland, 203

3. *Railroad.—Pleading.*—A complaint against a railroad company, to recover for personal injury, showed that the plaintiff, who was casually passing, at the request of an employee of the defendant, got upon a car that was moving slowly upon a switch, and applied the brakes to stop it, and, while so engaged, other servants of the defendant carelessly caused other cars of the defendant to collide violently with that which the plaintiff was upon, by reason of which the injury occurred.
Held, that the plaintiff must be regarded as a mere intermeddler, to whom the defendant owed no duty, either as employee, passenger or traveller on an intersecting highway, and that the complaint was bad on demurrer.
Everhart v. Terre Haute, etc., R. R. Co., 298

4. *Railroad Company.—Damages.*—The plaintiff, without invitation, and as a mere intruder, entered upon the uninclosed premises of the defendant, upon which was a building of the defendant in a state of visible decay. While there a sudden storm blew a fragment of the dilapidated building against the plaintiff, injuring him severely. The building had once been used as a freight house, but had been long since abandoned as a place of public business, and was not so situated, with reference to any public way, as to endanger travellers thereon.
Held, in an action for damages for the injuries received, that the plaintiff could not recover.
Lary v. Cleveland, etc., R. R. Co., 323

5. *Contributory Negligence.—Evidence.—Railroad.*—In a suit against a railroad company, for personal injury to a passer-by, by moving cars frightening the plaintiff's team, at a street crossing of a railroad where there is much travel upon the street, evidence for the plaintiff, showing that the company had, to the plaintiff's knowledge, kept a watchman at the crossing to give signals of danger, until a short time before the accident, when, without the plaintiff's knowledge, it withdrew him, and that, as the plaintiff approached the crossing, he was careful to look for such signals and saw none, is admissible, for the purpose (with other circumstances) not only of showing negligence by the defendant, but also of showing that the plaintiff was free from contributory negligence.
Pittsburgh, etc., R. W. Co. v. Yundt, 373

6. *Damages.*—A team of horses attached to a heavy wagon, having been left by the defendant in a public street near a railroad track, hitched by the lines only to the lever of the rubber-block, escaped from his control and ran away, and, in so doing, ran over and against and destroyed the plaintiff's scales, without the latter's fault.
Held, that the defendant was guilty of such negligence as made him liable, in damages, for the destruction of plaintiff's scales.
Wagner v. Goldsmith, 517

NEW TRIAL.

See *BILL OF EXCEPTIONS*, 2; *CRIMINAL LAW*, 19; *INSTRUCTION*, 5; *PRACTICE*, 5, 10; *SUPREME COURT*, 2, 11.

1. *Supreme Court.*—Errors of law, occurring at the trial, must be specific—

cally pointed out and assigned as causes for a new trial, in the motion therefor; and, if not so assigned, the Supreme Court will not consider such errors of law, nor decide any question thereby presented.

Craig v. Encey, 141

2. *Practice.—Affidavits.—Record.*—Affidavits in support of a motion for a new trial do not become parts of the record by being merely copied into the record as a part of the motion for a new trial.

Mountjoy v. State, 172

3. *Newly-Discovered Evidence.*—Newly-discovered evidence, not cumulative, which, in connection with the evidence given on the trial, would probably change the result, entitles a party to a new trial.

Jones v. State, ex rel., 217

4. *Affidavit.—Newly-Discovered Evidence.*—An affidavit for a new trial on the ground of newly-discovered evidence, not stating the facts expected to be proved, and that the affiant believed such facts to be true, is insufficient.

Hutton v. Jones, 466

5. *Misconduct of Jury.—Irregularity.—Verdict.—Evidence.—Practice.*—It is irregularity amounting to misconduct on the part of the jury, and good cause for a new trial, that a letter of the losing party, which was attached to a deposition of the prevailing party, and read in evidence, fell into the hands of the jury, with other papers in the cause, although inadvertently, and was read aloud and commented upon by one of the jurors while they were deliberating, and was returned into court with their verdict and the other papers.

Toohy v. Sarvis, 474

6. *Newly-Discovered Evidence.—Diligence.*—An application for a new trial upon the ground of newly-discovered evidence must show that the applicant used diligence to procure and present the evidence upon the trial, and that the evidence was of such a character as that it would probably produce a different result upon another trial.

Suman v. Cornetius, 506

7. *Same.—Evidence.—Practice.*—The insufficiency of the evidence to sustain a finding and judgment can not be presented by a complaint for a new trial filed after the close of the term at which the judgment was rendered.

Ib.

8. The granting of a new trial is seldom available error, and never until a very clear and strong case is made out.

Daggett v. Flanagan, 253

NOMINAL DAMAGES.

See HIGHWAY, 4.

NON EST FACTUM.

See EVIDENCE, 7; PLEADING, 3; PROMISSORY NOTE, 20.

NOTICE.

See BENEVOLENT SOCIETY, 3; CITY, 10, 11; LANDLORD AND TENANT, 2, 3, 6; MECHANIC'S LIEN, 2; MORTGAGE, 2; PARTNERSHIP, 1 to 9, 19, 20 to 22; PRACTICE, 10; SHERIFF'S SALE, 1.

OFFICE AND OFFICER.

See ATTORNEY, 1, 4; BILL OF EXCEPTIONS, 3; CITY, 10 to 12, 19; CLARK'S GRANT; CRIMINAL LAW, 7, 9; EVIDENCE, 6; HIGHWAY, 6; INSURANCE, 2; TOWN, 2.

ORDINANCE.

See CONSTITUTIONAL LAW, 1.

PARTIES.

See CLARK'S GRANT; DEED, 1; JUDGMENT, 9; PARTNERSHIP, 13, 14; PRACTICE, 1; SUPREME COURT, 15; TAXES, 2; WITNESS, 3, 4.

PARTITION.

See DEED, 4; VOLUNTARY ASSIGNMENT, 1.

Statute of Limitations.—An answer to a complaint in partition, that the cause of action did not accrue within five years before the commencement of the suit, nor within two years after the plaintiffs became of full age, is bad on demurrer, for want of sufficient facts.

Armstrong v. Cavitt, 476

PARTNERSHIP.

1. *Retiring Member.—Liability.—Notice.*—One whose membership in a partnership has been publicly advertised in the community where the business has been and is prosecuted owes a duty on retiring to give notice thereof, not merely to former customers, but to the public, who may give future credit on his supposed responsibility. *Uhl v. Harvey, 26*
2. *Same.—Estoppel.*—Where a retiring partner fails to give notice of his retirement, his liability continues on account of such failure, and he is estopped from denying his liability to those who give the concern credit on the faith of his supposed connection. *Ib.*
3. *Same.—Negligence.*—It is immaterial whether the failure to give the notice was wilful or negligent, or was the result of causes unforeseen and beyond control. *Ib.*
4. *Same.—Certificate of Deposit.—Banking Company.—Pleading.*—A complaint on a certificate of deposit, issued by an unincorporated banking firm, is good against a defendant, which shows his connection with the firm and the public advertisement of the fact prior to January, 1874, the want of published notice of his retirement, and that the plaintiff, who had known of his membership, but not of his retirement, in February, 1876, made the deposit sued for in the usual course of business, and in the belief that the defendant was yet a member of the firm, though the plaintiff had no dealings therewith while the defendant was in the firm. *Ib.*
5. *Same.—Pleading.—Estoppel.*—In such case the defendant was liable to the plaintiff, if at all, as a maker of the certificate, because estopped to deny his membership in the firm, and consequently liable on those paragraphs of the complaint which charged him as maker. *Ib.*
6. *Same.—Evidence.*—Under the sworn denial of such paragraphs, the facts concerning the defendant's withdrawal, his failure to give notice of it, and the plaintiff's knowledge on the subject were all admissible. The other paragraphs were unnecessary. *Ib.*
7. *Same.—Presumption.*—There was no legal presumption that the defendant had ceased to be a member of the firm, which continued in business at the same place and under the same name, because he stopped a newspaper notice of his connection. *Ib.*
8. *Same.—Notice of Dissolution.*—Continued liability is escaped, not by the partner ceasing to hold himself out as such, but by giving affirmative notice of the dissolution of the firm, or of his withdrawal. *Ib.*
9. *Same.—Public Advertisement of Membership.*—A member of a partnership is responsible for the public advertisement of his membership in the place of his residence and of the firm's business, though done by his partners without his personal knowledge; and, after his retirement, he will be responsible for the continued publication of the advertisement, though without his knowledge. The mere stopping of such publication when he learned of it was not enough. He was bound to publish such unequivocal notice as he could to prevent further misunderstanding. *Ib.*
10. *Same.—Evidence.*—Evidence that such partner had agreed with his co-partners to keep his retirement secret, and that he told different stories on the subject, was admissible upon the issue whether the appel-

- lant was in truth a member of the firm when the plaintiff made his deposits. *Ib.*
11. *Same.—Reports of Partnership.—Withdrawal.*—Current report was not admissible to show the partnership; but it was competent on the subject of notice to the plaintiff of a partner's withdrawal. *Ib.*
 12. *Same.—Corporation.—Stockholder.*—There may be stockholders in a partnership. An advertisement which showed that the defendant and others were stockholders in the "People's Bank," and responsible for all its liabilities, showed it to be a partnership, rather than a corporation. *Ib.*
 13. *Real Estate.—Husband and Wife.—Parties.—Receiver.*—In an action by the wife of a partner against a receiver of the firm who has sold real estate as partnership property and has the proceeds in court, to recover one-sixth of such proceeds, on the ground that the real estate was owned by her and her husband and his deceased partner as tenants in common, the purchasers of such property are neither proper nor necessary parties. *Newcome v. Wiggins, 306*
 14. *Same.—Wife's Interest in Proceeds.—Judgment.—Estoppel.*—In such case the wife, having been a party to the proceedings of the receiver, instituted to obtain an order to sell the real estate as partnership property, is concluded by the judgment, and so long as it remains in force can not claim any portion of the proceeds of the sale. *Ib.*
 15. *Unsuccessful Attempt to Incorporate.*—An association, which does business under an unsuccessful attempt to incorporate, is a partnership, composed not only of the directors, but of the subscribers to the articles. *Coleman v. Coleman, 344*
 16. *Same.—Partnership Indebtedness Purchased by Partner.—Payment.*—The purchase of partnership liabilities by a member of the firm, under ordinary circumstances, operates as a payment, and gives him no right against his co-partners, except to demand an accounting and contribution according to his outlay, and lawful interest. *Ib.*
 17. *Same.*—Under some circumstances, when it can be done without prejudice to creditors of the partnership, a member of the firm, who had purchased its obligations, may keep them alive in order to obtain the benefit of securities incident thereto, but not for an amount greater than his outlay in making the purchase, and lawful interest. *Ib.*
 18. *Same.—Pleading.—Contribution.*—The complaint of a partner, suing his co-partners for contribution for his outlay in buying or paying the firm debts, should state the amount of the outlay. *Ib.*
 19. *Notice of Dissolution.*—When a partner withdraws from a firm, direct personal notice of the fact to a customer is not necessary to relieve him from liability upon contracts made in the name of the old firm with such customer, after such withdrawal. Actual knowledge of the fact, however received, is sufficient. *Uhl v. Bingaman, 365*
 20. *Same.—Burden of Proof.*—Though, in a suit against partners, the plaintiff, being a customer, must prove the partnership to have existed, yet, having done so, if any defendant seeks to escape upon the ground that he had withdrawn from the firm before the contract was entered into, the burden is then on him to show such withdrawal, and that the fact had come to the plaintiff's knowledge. *Ib.*
 21. *Real Estate.—Conveyance.—Sheriff's Sale.—Tenants in Common.—Notice.*—A conveyance to two, by deed in the usual form, vests in each of the grantees the legal estate to an undivided half as tenant in common (section 2922, R. S. 1881), and if, in fact, the grantees be partners, and the estate partnership property, yet a *bona fide* purchaser at sheriff's sale upon execution against one of the grantees, without notice of the

fact, will hold title to the moiety, against partnership creditors seeking to subject it to their demands. *McMillan v. Hadley*, 590

22. *Same.*—*Instruction.*—*Jury.*—*Practice.*—In such a case, an instruction, which does not leave to the jury the question of notice to such purchaser at sheriff's sale, is erroneous. *Ib.*

PATENT.

See TRADE MARK.

PAWN-PLEDGE.

See REPLEVIN, 9.

PAYMENT.

See ACCORD AND SATISFACTION; ATTORNEY; MORTGAGE, 1; PARTNERSHIP, 16; PROMISSORY NOTE, 8, 9.

Promissory Note.—*Presumption.*—*Evidence.*—Anything is payment which the creditor accepts as payment, and one note is paid by another note, if the latter is accepted as payment; if the note given in payment be negotiable by the law merchant, the presumption is that it was received as payment, and, if not thus negotiable, the presumption is that it was not received as a payment, but evidence is admissible to show that in fact it was received as a payment. *Weston v. Wiley*, 54

PENALTY.

See CONTRACT, 5; TELEGRAPH COMPANY.

PERSONAL PROPERTY.

See CONTRACT, 7; JUDGMENT, 3; REPLEVIN; VENDOR AND PURCHASER, 1 to 4.

PLACITA.

See EVIDENCE, 8.

PLEADING.

See ACCORD AND SATISFACTION, 1; CITY, 11; CONTRACT, 2; CORPORATIONS; CRIMINAL LAW, 2, 7, 8, 12, 13, 19; DECEDENTS' ESTATES, 3; DEED; DEFAULT; FIXTURES, 3; INSURANCE, 1; JUDGMENT, 6, 8 to 10, 15; LIQUOR LAW, 6; MARRIED WOMAN; MORTGAGE, 2, 5, 9, 14; NEGLIGENCE, 3; PARTNERSHIP, 4, 5, 18; PRACTICE, 7, 13; PRIVATE WAY, 1; PROMISSORY NOTE, 1, 2, 11 to 16, 19, 20; RECOGNIZANCE, 1 to 3; REPLEVIN, 4, 7; SLANDER; TAXES; UNLAWFUL DETENTION OF LAND; VENDOR AND PURCHASER, 2, 5, 6.

1. *Demurrer.*—A demurrer to an entire complaint, containing one good paragraph, should be overruled. *City of Aurora v. Fox*, 1
2. *Same.*—*Harmless Error.*—*Practice.*—There is no available error in sustaining a demurrer to a good paragraph of an answer, if there remain another paragraph stating substantially the same matter. *Ib.*
3. *Non Est Factum.*—*Practice.*—When there is an answer of general denial, or *non est factum*, a special argumentative denial or *non est factum* might be properly struck out; but, if left in, such plea does not demand or admit of a reply. The ruling upon a demurrer to a reply filed to such answer presents no question. *Uhl v. Harvey*, 26
4. *Same.*—While the code requires the complaint to state the facts which constitute the cause of action, it is not good pleading to anticipate matters of defence. *Ib.*
5. *Mortgage.*—*Foreclosure.*—*Complaint.*—“*Duly Recorded.*”—A complaint to foreclose a mortgage of real estate against the grantee of the mortgagor, which alleges that the mortgage “was duly recorded in the

- mortgage records of Marion county, Indiana," without stating when it was done, is bad on demurrer. *Martens v. Rawdon*, 85
6. *Same.*—*Memorandum on Copy of Mortgage.*—Such a defect is not aided by a memorandum endorsed upon the copy of the mortgage filed, but not signed by any one, it being no part of the complaint; nor would it be cured by it, if signed. *Ib.*
 7. *Complaint.*—*Demurrer.*—*Practice.*—If a complaint contain several paragraphs, some founded on contract, and some on tort, some good and some bad, there is no available error, under the code, in overruling a demurrer to the entire complaint, assigning for causes a want of sufficient facts and a misjoinder of causes of action. *Baddeley v. Patterson*, 167
 8. *Same.*—*Arrest of Judgment.*—When a complaint contains several paragraphs, one only being good, a motion in arrest of judgment should be overruled. *Ib.*
 9. *Injunction.*—*Departure.*—*Verdict.*—*Judgment.*—*Mechanic's Lien.*—The complaint alleged ownership of a town lot and a building thereon, and that the defendant, without right, was about to remove the building, to the irreparable injury of the plaintiff. Wherefore, etc. Answer, that the defendant had leased the lot from the plaintiff, with the right to erect the building, and remove the same; that, while in possession and after written notice to quit, he was about to remove the building, as alleged in the complaint. Reply: 1. General denial. 2. That under a judgment against the plaintiff and defendant foreclosing a mechanic's lien upon the building and lot, for an indebtedness incurred by the defendant for materials for building, the same had been sold at sheriff's sale, and that in order to save his title to the lot the plaintiff had purchased the sheriff's certificate of sale and still holds it. *Held*, that the reply was a departure, and a demurrer to it should have been sustained.
Held, also, that a verdict, finding that "the plaintiff has a lien on the building and lot for \$119.40," did not warrant a judgment for either party, and should have been set aside. *Cuppy v. O'Shaughnessy*, 245
 10. *Estoppel.*—*Demurrer.*—The facts admitted by a demurrer to a pleading must be taken as true against, as well as in favor of, the pleader. *Ib.*
 11. *Bond.*—*Exhibits.*—In a suit upon a bond, where the complaint does not aver that a copy of the bond is filed therewith, but there is annexed to it, under the heading "Copy of bond," an instrument in the form of a bond executed by the defendants, and such as is described generally in the complaint, a demurrer should be sustained.
Rogers v. State, ex rel., 329
 12. *Practice.*—*Partial Answer.*—*Formal Commencement.*—*Averments.*—The formal commencement of a pleading does not absolutely control it, and if it clearly appears by direct averments, that a pleading is addressed to a part only of a complaint, it will be so treated, although in the commencement it assumes to answer the whole complaint.
Bowen v. Roach, 361
 13. *Administrator.*—*Unlawful Conversion.*—*Complaint.*—*Decedent's Estate.*—A complaint by an administrator, which shows that the intestate died the owner of certain sums of money and property, which, since the death of the owner, the defendants had wrongfully converted to their own use, is good, whether the conversion occurred before or after the granting of letters of administration. *Gerard v. Jones*, 378
 14. *Same.*—*Practice.*—*Motion to Make More Specific.*—A complaint by an administrator for the conversion of certain moneys alleged to have been "received by the decedent, or by the defendants for his use," from certain specified sources, is not, on account of the alternative averment, subject to a motion to be made more specific, that averment being immaterial. *Ib.*

15. *Same.—Statute of Limitations.—Demurrer.*—A plea of the six years limitation, which alleges that the cause of action accrued after the happening of a death, and that that death occurred within six years before the commencement of the suit, is self-contradictory and demurrable. *Ib.*
16. *Same.—Unlawful Conversion.—Denial.—Confession and Avoidance.—Issue.—Practice.*—When the general denial has been pleaded, it is not error to strike out pleas of special matter which may be proved under the denial; and anything which tends to show that an alleged unlawful conversion was lawful or justifiable, is provable under that issue. *Ib.*
17. *Same.—Practice.—Withdrawal of Pleading after Swearing Jury.*—A reply, filed to an answer to which a demurrer had been sustained, may be withdrawn by leave of court after the swearing of the jury, and a re-swearing of the jury will not be necessary. *Ib.*
18. *Same.—Replication.*—A reply which purports to, but does not, respond to the entire answer to which it is addressed, is not good. *Ib.*
19. *Demurrer.—Record.—Supreme Court.*—When the demurrer to a pleading is not set out in the record, the ruling of the circuit court on such demurrer will not constitute available error for the reversal of the judgment. *McGinnis v. Gabe, 457*
20. *Answer.—Cross Complaint.*—A bad answer is sufficient for a bad cross complaint. *Hamilton v. Huntley, 521*
21. *Contracts.—Exhibits.*—Where copies of the contracts sued on are set out in the body of the complaint, an allegation that copies are filed is unnecessary. *Jones v. Parks, 537*

POSSESSION.

See DEED, 5; PROMISSORY NOTE, 24; REPLEVIN, 1, 3, 12 to 16; SHERIFF'S SALE, 2; VOLUNTARY ASSIGNMENT, 1.

POWER OF ATTORNEY.

See EJECTMENT, 3.

PRACTICE.

- See BASTARDY; BILL OF EXCEPTIONS; DECEDENTS' ESTATES, 5; DEMURRER; DEPOSITION; EVIDENCE, 7; FIXTURES, 3; INSTRUCTION; INTERROGATORIES TO JURY; JUDGMENT, 1, 2, 4, 5 to 9, 15, 17; LIQUOR LAW, 6; MARRIED WOMAN, 2; MORTGAGE, 7, 8, 14; NEW TRIAL; PARTNERSHIP, 22; PLEADING, 2 to 4, 7, 8, 12, 14, 16, 17; PROMISSORY NOTE, 19, 20; REPLEVIN, 5; SPECIAL FINDING; SUPREME COURT; WITNESS, 1, 4.
1. *Parties as Witnesses.—Motion to Set Aside Finding.*—Where a party moves the court to set aside the submission and finding in a cause, upon the ground of his own absence, as a material and competent witness, he must show by affidavit the facts which made his absence necessary at the time of the trial. *Turpie v. Knowles, 221*
 2. *Harmless Error.—Demurrer.*—Sustaining a demurrer to a good paragraph of reply is a harmless error, if there be other paragraphs of the reply remaining under which the same evidence is admissible. *Daggett v. Flanagan, 253*
 3. *Exceptions.—Waiver.*—An exception taken to sustaining a demurrer to a pleading is not waived by taking leave to amend the pleading, if the party afterward declines to amend and allows judgment to go on the demurrer. *Ib.*
 4. *Same.—Amendment.*—The allowance of an amendment to pleadings after the issues have been closed is so much in the discretion of the trial court, that it will be available error only when it appears that that discretion has been abused. *Ib.*

5. *Same.—New Trial.*—The granting of a new trial is seldom available error, and never until a very clear and strong case is made out. *Ib.*
6. *Lost Receipt.*—If a trial court erred in striking out a party's testimony in his own behalf as to the execution and contents of a lost receipt, the subsequent admission of the party and the person who gave it, to testify to its execution, cured the error. *Anderson v. Donnell, 303*
7. *Answer.—Demurrer.—General Denial.*—It is not error to sustain a demurrer to a paragraph of answer, when the facts pleaded therein are admissible in evidence under the general denial filed therewith and remaining on file. *Epslein v. Greer, 348*
8. *Motion in Arrest.*—A motion in arrest of judgment reaches only such defects as are apparent on the face of the record, not cured by the verdict or a statute of amendments, or waived by failure to demur. *Baillet v. Humphreys, 388*
9. *Demurrer.—Motion to Strike Out.*—A bad complaint should be met by demurrer, but, if the right result be reached by a motion to strike out, the irregularity is not available error. *McGrew v. McCarty, 496*
10. *Courts.—Proceedings in Fieri.—Motion for New Trial.—Notice.*—The proceedings in a cause remain *in fieri* until the end of the term at which the motion for a new trial, though filed after judgment, is ruled upon, and in the mean time the court may alter, amend or set aside its former ruling, orders and judgment, without special notice to the parties. *McClellan v. Binkley, 303*
11. *Same.—Mechanic's Lien.—Finding.—Judgment.—Collateral Attack.*—In an action upon an account and to foreclose a mechanic's lien, there was a general finding for the plaintiff, on which a personal judgment only was entered against the defendant. After the rendition of the judgment, and at the same term of court, the defendant filed a motion for a new trial, which, at the next term, was overruled, and at a later day in the term, on motion of the plaintiff, without notice to the defendant, the court set aside its former judgment and entered a like personal judgment and a decree foreclosing the alleged lien. *Held*, that this action was within the power of the court, and not erroneous. The judgment of the circuit court can not be questioned collaterally on the ground that it goes beyond and is not according to the finding. *Ib.*
12. *Default.—Answer.—Trial.—Witness.*—Where a defendant's answer is standing, judgment can not be entered against him by default; but, unless summoned and failing to appear as a witness, he must be called and the cause submitted for trial. *Firestone v. Firestone, 534*
13. *Pleading.—Cross Complaint.—Judgment.—Harmless Error.*—Where a complaint is filed, praying substantially the same relief that was granted, the ruling upon an answer to the complaint is not material, if the judgment in the respect complained of was properly rendered upon the cross complaint. *Jones v. Parks, 537*

PREFERRED DEBTS.

See DECEDENTS' ESTATES, 4; MORTGAGE, 11.

PRESCRIPTION.

See EASEMENT; HIGHWAY, 1, 5; PRIVATE WAY, 2.

PRESUMPTION.

See BENEVOLENT SOCIETY, 1; CITY, 9; CRIMINAL LAW, 9, 14; HIGHWAY, 5; INSTRUCTION, 8; JUDGMENT, 11; PARTNERSHIP, 7; PAYMENT; SUPREME COURT, 5.

PRINCIPAL AND AGENT.

See ATTORNEY, 4; NEGLIGENCE, 2.

1. *Ratification.—Decedents' Estates.*—A., without authority, received for B. money derived from the sale of real estate by a commissioner in partition, and notified B. of the fact; B. disputed the validity of the sale, and refused to accept or have anything to do with the money; thereupon A. loaned the money to C., who was then solvent, but afterwards became insolvent, taking C.'s note, payable to B.
Held, that A.'s administrator was liable to B. for the money so received.
Held, also, that the bringing of the suit ratified the receipt of the money by A., but not the loaning. *Benson v. Liggett, 452*
2. *Same.—Authority to Loan Does Not Authorize Loan Without Security.—Trust and Trustee.*—An agent or trustee, with authority to loan, may not loan on the unsecured obligation of the borrower, much less one who has no authority beyond what is implied from possession and the duty to keep safely. *Ib.*

PRINCIPAL AND SURETY.

See CONTRACT, 6; ESTOPPEL; PROMISSORY NOTE, 1, 5, 6, 10, 13, 14; RECOGNIZANCE.

PRISONER, SUFFERING ESCAPE OF.

See CRIMINAL LAW, 7.

PRIVATE WAY.

1. *Obstruction.—Pleading.—Joinder of Causes.—Verdict.—Judgment.*—In a suit for damages, a paragraph of complaint for obstructing a private way of the plaintiff may be joined with one for obstructing a public highway in which the plaintiff has a special interest, and a verdict for the plaintiff is good without specifying whether the way is public or private, and a judgment thereon, "that the way be opened up and kept open," is proper. *Ross v. Thompson, 90*
2. *Same.—Prescription.—Instruction.*—In such case an instruction, declaring that the plaintiff can not recover unless he has proved a prescriptive right to the way claimed, but a slight variation in any particular would be of no consequence—such as a variation in the course of the way for a few feet at a given point, or in the terminus of the way, is correct. *Ib.*

PRIVIES.

See JUDGMENT, 13; MORTGAGE, 10; PROMISE.

PROMISE.

See CONTRACT, 6.

Privity of Contract.—Agency.—Trusteeship.—Demand.—Where, upon a consideration received, there is an explicit and unqualified promise to pay a specific sum, to become due at a known or stated time, to or for the benefit of a third person named, no case of agency or trusteeship arises which entitles the promisor to wait for a formal demand before discharging the promise, but it is, as to him, a purely legal obligation, and equity goes no further than to give the right of action to one who otherwise, for want of privity of contract, could not sue. *Miller v. Billingsly, 41 Ind. 489, and Durham v. Bischof, 47 Ind. 211, distinguished. Rodenbarger v. Bramblett, 213*

PROMISSORY NOTE.

See ACCORD AND SATISFACTION; CONTRACT, 2, 3, 6; INSURANCE; MORTGAGE, 1; PAYMENT.

1. *Principal and Surety.—Collateral Securities.—Answer.*—To a suit against the maker and two endorsers of negotiable notes, one of the endorsers.

answered that she endorsed merely as surety of the maker; that she was induced to do so by reason of the fact that the notes were secured by a mortgage on real estate of ample value to make this indebtedness and an older mortgage thereon for a small sum; that a suit was brought to foreclose the older mortgage, to which the plaintiff was made a party; that he suffered a judgment of foreclosure, and that the real estate was sold to satisfy the older lien, and the time for redemption allowed to expire, without her knowledge, the plaintiff giving her no notice thereof.

Held, that the plaintiff had a right to be passive as to the mortgage security, and was under no legal obligation to notify the endorser of said suit, and, therefore, that the answer was bad on demurrer.

Vance v. English, 74

2. *Pleading.—Answer.—General Denial.*—In an action upon promissory notes, an answer by the makers, that they had "executed" the notes, but had not delivered them, is sufficient, as such answer is equivalent to a general denial.

Ricketts v. Harcey, 152

3. *Same.—Void Consideration.*—An agreement by the payees of such notes, in consideration of their execution, to use their influence to secure the dismissal or favorable termination of a criminal prosecution, is void, and does not furnish a sufficient consideration for such notes.

Ib.

4. *Same.—Given for Debt of Bankrupt.*—An answer, that such notes had been given for the debt of A., who had been adjudged a bankrupt, of which the payees had notice, and that A. subsequently obtained his discharge in bankruptcy, is insufficient in bar of the action.

Ib.

5. *Same.—Testimony of Surety as to Declarations of Principal.*—It is error to allow a surety to testify to what his principal told him in the absence of the payees, at the time he signed the notes, for what purpose the notes were given.

Ib.

6. *Renewal Note.—Extension of Time.—Payable in Bank.—Evidence.—Principal and Surety.—Forged Names.—Rescission.*—A., M. and H. made their note to G., payable one year after date, M. and H. signing as sureties for A., but it not appearing that G. knew of their suretyship. When due, A. took up the note, paying the interest, at 12 per cent., for the past year and for a year in advance, and for the principal delivering to G. a new note payable in bank, but not "to order or bearer," signed as was the first note, but the names of M. and H. being forged thereto. G. held this note until after due, when, learning of the forgery, without surrendering the new note, or offering to return the money received with it, he brought this action upon the original note.

Held, that the action is maintainable.

Held, also, that G. had the right to treat the money paid him as a payment on the original note. The case is not one of rescission of contract. The new note, if in all respects valid, would have been only a new evidence of the pre-existing indebtedness.

Held, also, that, if the new note had been negotiable, it might perhaps have been necessary to bring it into court to be surrendered or cancelled, but, their names being forged, the sureties could not raise the question.

Held, also, that if the note in question had been put into judgment and execution against A., it would not have extinguished the right of action on the surrendered note.

Held, also, that there was no binding extension of time, even if G. had known that M. and H. were sureties.

Albright v. Griffin, 182

7. *Same.—Law Merchant.*—Promissory notes, payable at a bank in this State, but not "to order or bearer," are not governed by the law merchant.

Ib.

8. *Same.—Payment.—Merger.*—The giving of such a note in renewal of a

- former one, or for an antecedent debt, unless expressly taken as payment, at the risk of the taker, does not pay or merge the original liability; and, upon default in the payment of the new note, the holder is remitted to his right of action on the former obligation. *Ib.*
9. *Same.—New Note.—Discharge of Prior Note.*—Whether the paper be mercantile or non-negotiable, if some of the names are not genuine, and such fact is not known to the taker, it will not operate as a discharge of the prior liability. *Ib.*
 10. *Same.—Extension of Time.*—An extension of time given to the principal debtor, the creditor not having notice that the others were sureties, does not discharge them. *Ib.*
 11. *Answer.—Fraudulent Representations.*—To enable a defendant to defeat an action against him on a promissory note, on account of fraudulent representations inducing him to sign it, he must show that the representations were concerning some material matter, that they were false, that they were such as he had a right to rely upon, that he did rely upon them, and that he was deceived thereby.
Howe, etc., Co. v. Brown, 209
 12. *Same.—Fraud.—Allegations of Proof.*—The facts necessary to establish fraud must be alleged and proved by the party who relies upon it. *Ib.*
 13. *Same.—Surety.—Pleading.—Defalcation.*—In such case, an answer, that one of the defendants was surety on the bond of his brother as agent of plaintiff, that, after the termination of the period for which it was given, he was continued as agent and became a defaulter, that agents of the plaintiff represented to the defendants that his defalcation occurred while the bond was in force, and that they would at once commence suit upon the bond and criminal proceedings against the principal, must clearly show that he was not guilty of any defalcation while the defendant was liable as his surety, and that the defendants relied upon the alleged representations of liability. *Ib.*
 14. *Same.—Inducements.*—In such case, an allegation that the notes were executed "to avoid litigation and the shame of a criminal prosecution against their brother, and in consequence of fear of the same," implies that other inducements than the supposed liability of the defendant as surety entered into the transaction. *Ib.*
 15. *Pleading.—Title.*—A complaint upon promissory notes, which fails to aver to whom the notes are payable, is bad upon demurrer, as it does not show any title in the plaintiff to the notes. *Timmons v. Wiggins, 297*
 16. *Same.—Possession.—Evidence.—Fraudulent Agreement.*—A complaint in such action, which averred that possession of the notes sued upon was obtained by the defendant by trick, connivance and fraudulent practices, is not supported by proof that they were voluntarily surrendered in pursuance of a fraudulent agreement. *Ib.*
 17. *Fraud in Procuring Signature.—Negligence.*—A party whose signature to a promissory note payable in bank is obtained by fraud as to the character of the paper itself, he being unable to read it and it having been misread to him, and he not being guilty of negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound than if it were a total forgery, the signature included.
Webb v. Corbin, 403
 18. *Same.—Negligence.—When Question of Fact and When of Law.*—When a negotiable promissory note has been obtained by fraud as to the character of the paper, the maker signing in the belief that it was a different contract, the question whether he was negligent in signing, or in failing to ascertain the character of the paper, is ordinarily one of

fact; but, if the plea purports to set out all the facts and circumstances under which the note was obtained, the question may be decided upon demurrer as one of law. *Ib.*

19. *Same.—Pleading.—Ratification.—Practice.*—Ratification makes good from the beginning, and, under a denial of an answer of fraud in obtaining a note, subsequent ratification may be proved without pleading it specially. *Ib.*
20. *Same.—Non Est Factum.*—A special answer sworn to, which amounts to a plea of *non est factum*, closes the issue and does not admit of a reply. *Ib.*
21. *Delivery.—Gift.—Evidence.*—On trial of an action upon a promissory note, evidence that it was executed to the plaintiff as payee, at the request of her father, a creditor of the maker, and held by him, and that the plaintiff took it from the depository of his private papers in his absence, and without his knowledge or consent, and refused upon request to return it to him, but commenced suit against the maker, sustains a finding that the note was not so delivered as to vest the property therein in her and constitute of it an executed gift.
Hutton v. Jones, 466
22. *Same.—Trustee.—Constructive Delivery.*—In such case the father could not appoint himself trustee for his daughter and make a valid delivery of his own property to himself as such trustee; nor would his intention or promise to give the note to her constitute him a trustee for her. *Ib.*
23. *Same.—Deposition.*—In such case the suppression of questions and answers in a deposition of the plaintiff relative to credits on the note, not for payments of the maker, not authorized by her father, and not tending to show a delivery of the note, was not error. *Ib.*
24. *Same.—Hearsay.—Directions as to Possession.*—In such case, the father not being a party to the action, the daughter's conversations with him, unless a part of the transaction, were inadmissible, but he was properly permitted to testify what directions or assent he gave to her, or any other person, to take possession of the note. *Ib.*
25. *Illegal Consideration.—Grain-Broker.—Margins.*—In a suit upon a promissory note, it was found specially that the note was given to a grain-broker in consideration of commissions and advances upon wheat purchased by him for the maker, that the maker of the note had entered into a combination with others to purchase through the plaintiff and other brokers, for delivery during a certain month, more wheat than there was in the market, thereby forcing the price to a high rate, with a view to make profit on settling with sellers failing to deliver. Whether the plaintiff was a party to this combination, or had knowledge of it, was not found. A conclusion of law that the note was valid, and the plaintiff entitled to recover upon it, was held to be correct.
Wright v. Crabbe, 487

PUBLIC OFFENCE ACT.

See CRIMINAL LAW, 15; LIQUOR LAW, 5.

RAILROAD.

See NEGLIGENCE.

1. *Duty to Fence, in Towns and Cities.*—Railroad companies are liable for animals killed within towns and cities between the crossings of streets and alleys, if the road could be and is not fenced at the place of the killing.
Pittsburgh, etc., R. W. Co. v. Laufman, 519
2. *Same.—Exceptions to Rule.*—It is not for the courts to create exceptions to the statutory rule on the subject. *Ib.*

RATIFICATION.

See PRINCIPAL AND AGENT, 1; PROMISSORY NOTE, 19; TELEGRAPH COMPANY, 2.

REAL ESTATE.

See CITY, 7, 8; DEED; DESCENT; FIXTURES, 2 to 5; JUDGMENT, 11; PARTNERSHIP, 13, 14, 21; REDEMPTION; VOLUNTARY ASSIGNMENT, 1, 2.

REAL ESTATE, ACTION TO RECOVER.

See JUDGMENT, 11; LANDLORD AND TENANT, 4; MARRIED WOMAN.

1. *Evidence.—Judgment.—Harmless Error.*—In a suit for the possession of real estate, by the purchaser at a sale on execution against the execution defendant, the judgment entry is sufficient proof *prima facie* of the judgment, and the pleading need not be put in evidence, though, if admitted, the error is harmless. *Turner v. Nat'l Bank, etc., 19*
2. *Same.—Sheriff's Sale.—Assignee of Certificate.—Evidence.—Title in Stranger.*—In a suit for the possession of real estate, brought by the purchaser at sheriff's sale against the execution defendant, the defendant is not permitted to prove title in a stranger, and the assignee of the sheriff's certificate, who receives a sheriff's deed thereon, is, in legal effect, the purchaser at the sheriff's sale, within the meaning of this rule. *Ib.*
3. *Same.—Receipt.—Execution.—Res Gestæ.—Harmless Error.—Semble,* that a receipt from a judgment plaintiff to the sheriff for the proceeds of lands sold on execution issued on a judgment is competent evidence as a part of the *res gestæ*, in an action by the purchaser against the execution defendant for possession of the land; but, in any event, such evidence is harmless. *Ib.*

RECEIPT.

See PRACTICE, 6; REAL ESTATE, ACTION TO RECOVER, 3.

RECEIVER.

See PARTNERSHIP, 13, 14.

RECOGNIZANCE.

1. *Pleading.—Special Bail.*—In a suit on a recognizance of special bail against the sureties, joining also the principal debtor as a defendant, the complaint averred sufficient to make it good against the sureties, and also that the principal had placed in the hands of the sureties a sum of money named, to secure them.
Held, that a demurrer by the principal debtor should have been sustained. *Shields v. Smith, 425*
2. *Same.—Answer.*—An answer in such case by special bail, that after judgment against S., principal debtor, they surrendered his body "in execution; that by virtue of said execution the sheriff of M. county imprisoned said S. in the jail of said county, in said cause, until he was discharged by due process of law, and by the judge of the M. Circuit Court," though awkwardly drawn, is good on demurrer. *Ib.*
3. *Same.—Surrender.—Release.*—An answer by the sureties in such case, that they offered to surrender the body of the principal debtor, and that the plaintiff requested them not to do so, and agreed to release them from the recognizance if they would not make the surrender, is good on demurrer. *Ib.*
4. *Special Bail.—Liability.—Discharge.—Habeas Corpus.—Evidence.*—Special bail is not subject to liability, where the principal debtor, having been surrendered, is discharged by due process of law; and a record of proceedings in *habeas corpus*, showing such discharge, is proper evidence of the discharge, and can not be impeached collaterally. *Ib.*
5. *Same.—Instructions.*—In a suit upon a recognizance of special bail, an

instruction to the jury declaring correctly the legal effect of the recognizance, is proper. *Ib.*

6. *Same.—Harmless Error.*—An instruction in such case, that after judgment the body of the principal debtor might have been taken in execution and committed to jail for a period of ten or fifteen days, though erroneous (R. S. 1881, section 865), is harmless to the plaintiff. *Ib.*

RECORD.

See BILL OF EXCEPTIONS, 3, 4; CRIMINAL LAW, 4; EVIDENCE, 4; JUDGMENT, 2, 5; NEW TRIAL, 2; PLEADING, 19.

REDEMPTION.

See SHERIFF'S SALE, 1.

Rents.—Statute Construed.—Under the statute of 1861, giving to the judgment defendant the right to occupy lands sold on execution, for the period of a year from the sale, with a liability for rents if he do not redeem, the rents during that period are his absolutely, in his own right, and not as trustee for the purchaser, and if he be insolvent, and assign the rents in payment of a just debt, the assignee is not liable therefor to the purchaser. *Ridgeway v. Nat'l Bank, etc., 119*

REFEREE.

See INJUNCTION, 2.

RELEASE.

See RECOGNIZANCE, 3.

RENT.

See LANDLORD AND TENANT; REDEMPTION; REPLEVIN, 12 to 15.

REPLEVIN.

See FIXTURES, 1 to 3.

1. *Personal Property.—Conversion.—Right of Possession.*—In an action to recover for the conversion of public property, the plaintiff must show a right of possession in himself at the time he began his action. *Easter v. Fleming, 116*
2. *Same.—Action to Recover.—Title.*—In actions for the recovery of personal property, the plaintiff must recover on the strength of his own title, and not upon the weakness of his adversary's. *Ib.*
3. *Same.—Sheriff's Sale.*—If a claimant of personal property has no title thereto, he can not recover it from one in possession claiming title by virtue of a sheriff's sale, although the sale was irregular. *Ib.*
4. *Pleading.—Complaint.—Verdict.—Defects Cured.*—A complaint in replevin, which alleges that the defendants unlawfully and wrongfully took from the plaintiffs, and converted to their own use, the following described personal property, etc., shows with sufficient certainty, at least after verdict, that the property was taken without leave and had not been returned. *Roberts v. Porter, 130*
5. *Same.—Competency of Witness.—Husband and Wife.—Practice.*—In an action of replevin, for the recovery of the husband's personal property, his wife was not a competent witness as to matters for or against him, under the provisions of section 2 of the act of March 11th, 1867, defining who shall be competent witnesses. *Ib.*
6. *Justice of the Peace.—Jurisdiction.—Statute Construed.—Cases Overruled.*—Under the provisions of section 9 of the act concerning justices of the peace, 2 R. S. 1876, p. 605, an action of replevin before a justice must be brought either in the township in which the property was taken, or in which it is detained. *Beddinger's Adm'r v. Jocelyn, 18 Ind. 325, and Test v. Small, 21 Ind. 127, overruled. Copple v. Lee, 230*

7. *Pleading.—Complaint and Affidavit.*—A complaint, which contains all the statutory requisites of an affidavit to obtain an order for the delivery of personal property, and is verified by the oath of the plaintiff or of some one in his behalf, will be sufficient, both as an affidavit and a complaint in replevin. *Cox v. Albert, 241*
8. *Same.—Evidence.—Demand.—Conversion.*—In a suit for the recovery of the possession of personal property, alleged to be unlawfully detained, if a wrongful conversion of the property by the defendant is shown by the evidence, a demand for the property, before suit brought, and proof of such demand, are alike unnecessary. *Ib.*
9. *Same.—Pawn or Pledge.—Tender.*—Where personal property is pawned or pledged as a security for a debt or loan, and the pledgee, without notice to the pledgor, wrongfully disposes of the property or converts the same to his own use, the pledgor may sue at once for the recovery of the property, or of its value, without any demand therefor, and without having first paid or tendered the amount of such debt or loan. *Ib.*
10. *Same.—Affidavit.—County in which Property is Detained.—Verdict.—Evidence.*—In an affidavit in replevin, the statute requires that the affiant should state in what county he believes the property is detained; but it is not necessary to the validity of the verdict, that this statement should be sustained by any evidence. *Ib.*
11. *Justice of the Peace.—Jurisdiction.*—In actions of replevin, justices of the peace have jurisdiction where the property does not exceed in value two hundred dollars. *Grubaugh v. Jones, 350*
12. *Landlord and Tenant.—Crops.—Sheriff's Sale.*—One who purchases land at sheriff's sale can not, after crops have been harvested by the tenant in possession at the time of the sale, and suffered to remain in actual possession, maintain replevin for the grain harvested by the tenant. *Bowen v. Roach, 361*
13. *Same.—Evidence.—Deed.*—In such an action, a deed executed before the decree is admissible in evidence to show that the tenant's possession was under color and claim of right. *Ib.*
14. *Same.—Undivided Interest in Personally.*—The owner of an undivided interest in personal property can not maintain replevin against a co-owner. *Ib.*
15. *Same.—Possession of Crops Planted.*—A tenant of the execution debtor, having been left in undisturbed possession of the premises sold, under a claim of right, may rightfully retain possession of the crop planted, cultivated and reaped by him, yielding to the holder of the sheriff's deed the landlord's share. *Ib.*
16. *Evidence.—Possession.*—To sustain replevin the evidence must show that the defendant was in actual or constructive possession of the property at the time of the commencement of the action. *Louthain v. Fitzer, 449*
17. *Same.—Sheriff.—Execution.—Delivery Bond.—Demand.—Demurrer to Evidence.*—In replevin against a sheriff evidence that the property belonged to the plaintiff, and was levied upon under an execution against his father; that the sheriff then took from the plaintiff a delivery bond and permitted the property to remain on the farm where he resided; and that afterwards the plaintiff formally demanded and was refused a return of the property to him, is sufficient on demurrer to sustain the action. *Ib.*

REPLEVIN BAIL.

See LIQUOR LAW, 2.

RES ADJUDICATA.

See MASTER AND SERVANT, 2.

RES GESTÆ.

See REAL ESTATE, ACTION TO RECOVER, 3.

RESCISSION.

See MASTER AND SERVANT; MORTGAGE, 14; PROMISSORY NOTE, 6; VENDOR AND PURCHASER, 1, 5.

RESIGNATION.

See CITY, 19.

REVIEW OF JUDGMENT.

See JUDGMENT.

SALE.

See CONTRACT, 7; CRIMINAL LAW, 1; DEED, 6; DESCENT, 4; EJECTMENT, 1; JUDGMENT, 11, 12; PARTNERSHIP, 21; REAL ESTATE, ACTION TO RECOVER; REDEMPTION; REPLEVIN, 3, 12; SHERIFF'S SALE; VOLUNTARY ASSIGNMENT.

SCHOOL LAW.

See CITY, 19; TOWN, 2; TOWNSHIP TRUSTEE.

SCHOOL TRUSTEE.

See CITY, 19.

SEAL.

See CRIMINAL LAW, 10.

SEIZIN.

See DEED.

SET-OFF.

See DEED, 8.

SHERIFF.

See EXECUTION; REPLEVIN, 17.

SHERIFF'S DEED.

See DEED, 6; REAL ESTATE, ACTION TO RECOVER; REPLEVIN, 13 to 15; VENDOR AND PURCHASER, 7.

Date.—Delivery.—The date of a sheriff's deed is *prima facie* evidence of the time of its delivery. *Turner v. Nat'l Bank, etc., 19*

SHERIFF'S RETURN.

See EXECUTION.

SHERIFF'S SALE.

See DEED, 6; EJECTMENT, 1; JUDGMENT, 11, 12; PARTNERSHIP, 21; REAL ESTATE, ACTION TO RECOVER; REDEMPTION; REPLEVIN, 3, 12.

1. *Execution.—Levy.—Judgment.—Lien.—Deed.—Notice.*—A joint judgment was rendered against H. and others, upon which an execution was issued and levied upon lands of one of the other defendants, which was subject to the prior lien of an older judgment, but of value much exceeding both judgments. This land was sold to satisfy the senior judgment, and the sheriff having returned that fact upon the execution on the junior judgment, and an *alias* issuing, he levied it upon the lands of H., which he sold upon it to the plaintiff, who, in due time, obtained a sheriff's deed.

Held, that the levy of the first execution was, until legally disposed of, a satisfaction of the judgment.

Held, also, that the mere sale to satisfy the older lien did not, in view of the right to redeem therefrom, given by statute, divest the junior lien, and was not such a disposition of the property as warranted the levy on the lands of H.

Held, also, that the purchaser, being the plaintiff, was charged with notice of the irregularity, and took nothing by his purchase and deed.

Neff v. Hagaman, 57

2. **Deed.—Possession.**—A sheriff's sale without a deed confers no title, nor does it entitle the purchaser to possession.

Goss v. Meadors, 523

SIGNATURE.

See **BILL OF EXCEPTIONS**, 3; **CRIMINAL LAW**, 9; **PROMISSORY NOTE**, 17.

SLANDER.

Actionable Words.—Pleading.—In an action of slander by D. against E., it was averred that A. died testate, bequeathing to B. and C., daughters of D., \$500 each, leaving E., his son, surviving him, and that E. spoke of and concerning D., and of and concerning his father's death, the following false and scandalous words: "Old lady, you gave my father four double doses of morphine on the day he made his will; you said, old man, you had better be fixing up your business; if it had'n't been for you giving morphine, your daughters would not have gotten what they did."

Held, that the words, with the proper innuendoes, are not actionable *per se*.
Held, also, that the extrinsic circumstances averred in the complaint do not render the words actionable.

McFadin v. David, 445

SOLDIER'S BOUNTY.

See **CONTRACT**, 4.

SPECIAL BAIL.

See **RECOGNIZANCE**.

SPECIAL FINDING.

See **MORTGAGE**, 7.

1. **General Verdict.—Practice.**—It is only in cases where the special findings are irreconcilable with the general verdict that they control it.

Chambers v. Chambers, 400

2. **Same.—Account.**—On trial of an action on an account current, an answer of the jury to the question, "What amount, if any, have you allowed the defendant on the account in his favor in your general verdict?" is not repugnant to the general verdict for the plaintiff for the excess due him.

Ib.

STATUTE CONSTRUED.

See **CITY**, 3, 7, 8, 9, 17; **COSTS**; **CRIMINAL LAW**, 1, 5, 6, 15, 18; **DESCENT**, 1; **HIGHWAY**, 6, 7; **JUDGMENT**, 16; **LANDLORD AND TENANT**, 3; **LIQUOR LAW**, 5; **MORTGAGE**, 11; **REDEMPTION**; **REPLEVIN**, 5, 6; **VOLUNTARY ASSIGNMENT**.

STATUTE OF LIMITATIONS.

See **JUDGMENT**, 5; **PARTITION**; **PLEADING**, 15.

Account Current.—Answer.—Reply.—Pleading.—A reply to an answer pleading the statute of limitations, which states that the account sued on was a mutual running account, and that every item of the bill of particulars is one item thereof, and shows the last item to be within six years, is sufficient.

Chambers v. Chambers, 400

STOCKHOLDER.

See **CORPORATIONS**; **PARTNERSHIP**, 12.

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STREET RAILWAY.

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SUBMISSION.

See PRACTICE, 1; SUPREME COURT, 8.

SUBPENA.

Service.—Witness.—Continuance.—No person other than the sheriff or his deputy is authorized to serve a subpoena, and a party who has not thus subpoenaed his witness, but has served the subpoena himself, is not entitled to a continuance on account of the absence of such witness. *Leary v. Meier*, 333

SUBROGATION.

See CONTRACT, 6; LIQUOR LAW, 2.

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See JUSTICE OF THE PEACE, 2.

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See CRIMINAL LAW, 16; TELEGRAPH COMPANY.

SUPREME COURT.

See BILL OF EXCEPTIONS, 4; CRIMINAL LAW, 11; EVIDENCE, 3; INJUNCTION, 4; INSTRUCTION, 6, 9; JUDGMENT, 2, 4; NEW TRIAL, 1, 2.

1. *Evidence.—Verdict.*—When there is evidence, which, if credited, justifies the verdict, though this evidence is contradicted, the Supreme Court will not weigh the evidence, nor disturb the verdict.

Becker v. Denmore, 147

2. *Practice.—New Trial.—Weight of Evidence.*—The Supreme Court will not reverse a judgment upon the evidence, if it fairly tends to sustain the verdict or finding on every material point. *Adams v. Stringer*, 175

3. *Practice.—Admission of Evidence.—Grounds of Objection.*—Where, on the trial of a cause, a party objects to a question put to a witness, the record must show that the party stated to the court the grounds of his objection, or the action of the court thereon will not be considered by the Supreme Court. In such a case, the party can not state one ground of objection to the trial court, and insist upon other and different grounds in the Supreme Court. *Pennsylvania Co. v. Hoagland*, 203

4. *Practice.—Instructions.—Harmless Error.*—Instructions to the jury which assume the truth of facts necessary to make out the case, when there is really no dispute about such facts, and no conflict in the evidence concerning them, is a harmless error, and not available in the Supreme Court. *Jones v. State, ex rel.*, 217

5. *Presumption.—Trial Court.—Evidence.—Practice.*—In the Supreme Court, all the presumptions go in favor of the proceedings below, and a judgment will not be reversed for the exclusion of evidence, unless it be shown that the evidence excluded had some relation to the real and particular question involved at the trial. *Parker v. The State*, 259

6. *Practice.—Appeal.—Dismissal.*—Lapse of time for the taking of an appeal to the Supreme Court may be pleaded in bar of the appeal; or the question may be raised on motion. *Day v. City of Huntington*, 280

7. *Same.—Disability of Appellant.*—A motion to dismiss an appeal, not taken in time, will be sustained, unless the appellant shows that he was under disability. *Ib.*

8. *Same.—Agreement for Submission.*—An agreement by the appellee for

the submission of the cause, entered on the transcript more than a year before the filing thereof, does not affect the appellee's right to move for a dismissal of the appeal because not taken in time. *Ib.*

9. *Evidence.—Witness.—Practice.—Verdict.*—Where the evidence is conflicting, and questions of fact depend upon the credibility of witnesses, the Supreme Court will not disturb the verdict. *Grubaugh v. Jones*, 350
10. *Practice.—Infant.—Appearance.—Guardian ad Litem.*—Where an infant is co-plaintiff with an adult, his appearance by the attorney of the adult is valid; and in such case an appeal to the Supreme Court will not be dismissed because the infant does not appear by guardian or guardian ad litem. *Chandler v. Chandler*, 417
11. *Practice.—Assignment of Errors.—New Trial.—Suppressing Deposition.*—Error in suppressing a deposition is a reason for a new trial, but not a proper specification in an assignment of errors. *Hatton v. Jones*, 466
12. *Same.—Specification of Error.*—A specification: "The court erred in rendering the judgment in said cause," is too general to present any question for consideration. *Ib.*
13. *Evidence.—Verdict.*—The Supreme Court will not disturb a verdict because the evidence is conflicting, if there is any tending to sustain it. *Toohy v. Sarvis*, 474
14. *Same.—Appeal by Plaintiff.—When Judgment Affirmed.*—When the plaintiff appeals and the record shows he has no cause of action against the defendant, intervening errors, if any, must be regarded as harmless, and the judgment below must be affirmed. *Fell v. Muller*, 507
15. *Practice.—Co-parties on Appeal.—Waiver of Objection for Want of Parties.*—Where one of several parties, plaintiff or defendant, appeals to the Supreme Court, he is only required, by section 551 of the code of 1852 (section 635, R. S. 1881), to give notice of his appeal to his co-parties, if any, in the judgment appealed from; and if the cause is there submitted by agreement, without an objection then made of the proper parties, such objection is thereby waived. *Easter v. Severin*, 540
16. *Practice.—Evidence.—Harmless Error.—Witness.*—The erroneous admission of evidence, and allowing an incompetent witness to testify, are not available error, if it appear affirmatively by the special findings of the court that the evidence thus improperly admitted had no effect whatever upon the result of the trial. *Shaw v. Ferguson*, 547

TAXES.

1. *Guardian and Ward.—Complaint.—Property Omitted from Taxation.*—In an action by a county treasurer against a guardian, to recover taxes on the money of his wards, which had not been assessed during a number of years, and on which no taxes had been paid, but which money was afterward assessed for the years it was omitted from taxation, and placed upon the tax duplicate for collection, the complaint must specifically aver by what officer and under what circumstances such special assessment was made, and the averment, that the taxes sued for were assessed by "the proper authorities," is insufficient. *Vogel v. Vogler*, 355
2. *Same.—Parties.*—In such action the wards are not proper parties to the action, though the money in the hands of the guardian, if liable for taxation, ought to have been assessed in their names. *Ib.*

TAX LIST.

See EVIDENCE, 5.

TELEGRAPH COMPANY.

1. *Contract to Transmit and Deliver Dispatch on Sunday.—Penalty.*—The statutory penalty given by "An act to regulate electric telegraph com-

panies," 1 R. S. 1876, p. 868, can not be recovered by a person who has delivered his dispatch for transmission and delivery on Sunday.

Rogers v. The W. U. Telegraph Co., 169

2. *Same.—Void Contract.—Ratification.*—A contract for transmitting a telegraphic dispatch, made on Sunday, is void, and the retention of the dispatch and of the consideration paid by the sender does not constitute a ratification. *Ib.*
3. *Same.—Work of Necessity.*—A dispatch, "Come up in morning; bring all," can not be regarded as a work of necessity, within the meaning of the statute for the protection of the Sabbath; nor is telegraphing of itself a work of necessity. *Ib.*

TENDER.

See REPLEVIN, 9.

TENANTS IN COMMON.

See PARTNERSHIP, 13, 21.

THREATS.

See DURESS.

TITLE.

See DEED; FIXTURES, 2; REAL ESTATE, ACTION TO RECOVER; REPLEVIN, 2, 3; VENDOR AND PURCHASER, 5, 7.

TOLL GATE.

See CRIMINAL LAW, 14.

TOWN.

See CITY; CLARK'S GRANT; CONSTITUTIONAL LAW, 1.

1. *Constitutional Law.*—The act of June 17th, 1852, amendatory of the charter of Clarksville, as far as it authorizes the new trustees for which it provides, to sue for and receive the funds derived from the sale of lots under the charter of 1783, granted by Virginia, does not impair the obligation of any contract, and is valid. *Frisbie v. Fogg, 269*
2. *Same.—Mandamus.—School Law.*—Mandamus lies by an officer to compel the delivery, by his predecessor, of the records, books and papers of the office, and to compel the payment of money which the officer is required by law to apply to school purposes, the needs of which may require the prompt application of the money. *Ib.*

TOWN TRUSTEES.

See CLARK'S GRANT.

TOWNSHIP TRUSTEE.

1. *Bond.—School Revenues.—Mere Use not a Breach.—Conversion.*—The mere use of school revenues of the township by a township trustee in his own business is not such a conversion of the money as constitutes a breach of the conditions of his bond. *Brown v. State, ex rel., 239*
2. *Same.—Action on Bond.—Damages.—Judgment.*—In an action on the bond of a township trustee for a failure to account for and pay over school revenues received by him, the provision of section 7, 1 R. S. 1876, p. 781, that the judgment shall include an assessment of ten per cent. damages upon the amount thereof, is imperative. *Ib.*

TRADE-MARK.

1. *Damages.—Injunction.*—Property in the use of a word as a trade-mark, to designate manufactured goods, such as the word "Hoosier," to distinguish a grain drill, may be acquired by adoption and exclusive use, and, when acquired, the unauthorized use by another of the mark,

to designate similar goods, is a wrong which may be compensated by damages, and prevented by injunction.

Julian v. Hoosier, etc., Co., 408

2. *Same.—Patent.*—A trade-mark, used to designate goods manufactured under letters-patent, is assignable with the letters-patent, and the right to damages accrued for infringement is also assignable. *Ib.*
3. *Same.—Non-User.—Abandonment.—License.*—Property in a trade-mark may be abandoned and thereby lost, but a complaint for infringement, which shows non-user for a year, does not disclose an intention to abandon; and without such intention there is no abandonment by mere non-user. Such non-user might possibly imply a gratuitous license to others to use the mark for the time being, and thereby preclude the recovery of damages for the time; but this license is revocable, and does not preclude the remedy by injunction for the future. *Ib.*

TRANSCRIPT.

See CRIMINAL LAW, 4; EVIDENCE, 3, 4, 8.

TRIAL.

See PRACTICE, 12.

TRUST AND TRUSTEE.

See PRINCIPAL AND AGENT, 2; PROMISE; PROMISSORY NOTE, 22; WILL.

TURNPIKE.

See CRIMINAL LAW, 14; MORTGAGE, 3 to 5.

UNLAWFUL DETENTION OF LAND.

1. *Appeal Bond.—Mesne Profits Pending Appeal.*—Under the statute concerning the unlawful detention of lands (2 R. S. 1876, p. 662), on an appeal by the defendant from the judgment of the circuit court to the Supreme Court, the appeal bond may be lawfully conditioned, that the defendant, among other things, will pay and satisfy all damages which the plaintiff may sustain, for mesne profits of the premises recovered, or for any waste committed thereon, as well before as during the pendency of such appeal. *Craig v. Ency, 141*
2. *Same.—Assignment of Bond.—Complaint.*—An appeal bond is assignable by endorsement in writing, so as to give the assignee a right of action thereon, in his own name; and where the plaintiff, in an action on such bond, sues only for the recovery of the mesne profits of the premises during the pendency of the appeal, his complaint will not be bad on demurrer thereto, for the want of sufficient facts, merely because it contains an admission of the payment of the previous judgment and costs. *Ib.*

USER.

See HIGHWAY, 1 to 5; TRADE-MARK.

VAGRANCY.

See CRIMINAL LAW, 12.

VENDOR'S LIEN.

See DECEDENTS' ESTATES, 3.

VENDOR AND PURCHASER.

See CONTRACT, 7; MORTGAGE, 2.

1. *Contract.—Rescission.—Fraud.*—A purchaser of property can not rescind the contract for fraud so long as he retains the property, if of any value. *Cates v. Bales, 286*
2. *Same.—Pleading.—Answer.—Value of Property.—Offer to Return.*—An answer seeking to avoid the payment of the price of property purchased,

on the ground of fraud, which does not aver that the property was of no value, or does not aver a return or an offer to return the property, is insufficient on demurrer. *Ib.*

3. *Same.—Consideration.—Copyright.—Insurance Plan.*—A court can not say that the transfer of an instrument for the organization of insurance companies is of no value, as the vendor of such property, before publication, if not copyrighted, is entitled to control its disposition. *Ib.*
4. *Same.—Instruction.*—An instruction, that the transfer of a plan for the organization of insurance companies is of no value because there is no law in this State authorizing the formation of such companies, is erroneous. *Ib.*
5. *Contract.—Rescission.—Failure of Title.—Answer.—Deed.*—In an action to rescind a contract for the purchase of real estate, and recover back the purchase-money paid, on the ground that the defendant did not convey at the time stipulated, and has no title, it is not necessary, in order to defeat the action, that the defendant with his answer should bring a deed into court for the plaintiff. It is enough to show that he is not in default. *Teal v. Langsdale, 339*
6. *Same.—Pleading.—Reply.—Departure.*—In such action, a reply, that since the commencement of the suit the defendant has conveyed the property to another, is a departure, and for that reason a demurrer was properly sustained to it. *Ib.*
7. *Same.—Sheriff's Deed.—Evidence of Title.*—Where a party claims title through a judgment of foreclosure, a sheriff's deed is not sufficient evidence of his title. *Ib.*

VERDICT.

See NEW TRIAL, 5; PLEADING, 9; PRIVATE WAY, 1; REPLEVIN, 4, 10; SPECIAL FINDING; SUPREME COURT, 1, 9, 13.

Defects not Cured.—Complaint.—Demurrer.—A verdict will not aid defective averments in a complaint, where its sufficiency is questioned by a demurrer. *McFadin v. David, 445*

VOLUNTARY ASSIGNMENT.

1. *Sale of Debtor's Real Estate, a Judicial Sale.—Statute Construed.—Vested Right of Debtor's Wife to Possession and Partition.*—The sale of a debtor's real estate, under the act of March 5th, 1859, providing for voluntary assignments, 1 R. S. 1876, p. 142, is a judicial sale within the meaning of the act of March 11th, 1875, 1 R. S. 1876, p. 554, vesting the inchoate interests of married women in the lands of their husbands, when their title has been divested, and entitles the wife to immediate possession and partition. *Lawson v. DeBolt, 563*
2. *Same.—Jurisdiction.—Sale of Real Estate in Another County.*—The circuit court of the county in which the debtor resides, and makes his assignment of his property, has jurisdiction to order and confirm the sale and conveyance of his real estate in another county. *Ib.*
3. *Same.—Acts of February 1st and 26th, 1875.—Amendment.*—The act of February 26th, 1875, 1 R. S. 1876, p. 145, undertaking to amend section 10 of the act of March 5th, 1859, after its effectual amendment by the act of February 1st, 1875, 1 R. S. 1876, p. 144, is unconstitutional and void. *Ib.*
4. *Same.—Private Sale on Credit.—Deferred Payments.*—Section 10, 1 R. S. 1876, p. 144, as amended, fully authorizes an order by the court for the sale of the debtor's real estate at private sale, on a credit not exceeding two years from the date of such sale. *Ib.*
5. *Same.—Collateral Attack.*—The orders of a circuit court having jurisdiction of an insolvent debtor's assignment, even though erroneous, are not open to collateral attack. *Ib.*

WAIVER.

See JUDGMENT, 9; PRACTICE, 3; SUPREME COURT, 15.

WARRANT.

See CRIMINAL LAW, 4, 7.

WEIGHT OF EVIDENCE.

See SUPREME COURT, 2.

WIDOW.

See DECEDENTS' ESTATES, 4; DESCENT, 2 to 4; JUDGMENT, 3.

WILL.

Charitable Trust.—Intoxicating Liquors.—A bequest in a will, devising to the trustees of a certain organized church, having trustees, and to their successors, \$1,000, to be put at interest, and the interest to be appropriated annually to the suppression of the manufacture, sale and use of intoxicating liquors, and providing that if said trustees failed for two successive years to use the interest as directed, then the whole bequest should go to the heirs of the testator, is valid. *Haines v. Allen*, 100

WITNESS.

See DECEDENTS' ESTATES, 5; EVIDENCE, 2; PRACTICE, 12, REPLEVIN, 5; SUBPOENA; SUPREME COURT, 9.

1. *Practice.—Exclusion of Question to Witness.*—It is not error to exclude a question, if no statement is made of what facts are expected to be elicited; and, if the bearing of the proposed testimony is remote and inferential, its relevancy should also be suggested. *Browning v. Hight*, 257
2. *Impeachment.*—Questions evidently asked for the purpose of impeachment only, but fixing neither time nor place, are improper. *Halton v. Jones*, 466
3. *Same.—Evidence.—Deposition of Deceased Party.—Testimony of Surviving Party.*—Where the deposition of a deceased party, represented by her executor, has been read in evidence, the other party may testify on all material points and matters of fact embraced in the deposition. *Id.*
4. *Practice.—Suits by or against Administrators.—Parties, when Witnesses.*—Under the second proviso in section 1 of the act of March 15th, 1879, amendatory of section 2 of the act of March 11th, 1867, defining who should be competent witnesses (Acts 1879, p. 245), in an action against the representative of a deceased maker and a surviving maker of a promissory note, where each sets up a separate defence, it is discretionary with the trial court to permit the surviving maker to testify. *Meyer v. Morris*, 558

WORK OF NECESSITY.

See TELEGRAPH COMPANY, 3.

WRITTEN INSTRUMENT.

See EVIDENCE, 7; MORTGAGE, 3, 4.



